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COURT OF CUSTOMS APPEALS REPORTS

VOLUME II

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IN THE UNITED STATES COURT
OF CUSTOMS APPEALS

APRIL, 1911, TO FEBRUARY, 1912

THOMAS H. CLARK

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WASHINGTON
1912



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UNITED STATES COURT OF CUSTOM APPEALS.

Presiding Judge:

Honorable ROBERT M. MONTGOMERY.

Associate Judges:

Honorable JAMES F. SMITH.

Honorable ORION M. BARBER.

Honorable MARION DE VRIES.

Honorable GEORGE E. MARTIN. ✓

Honorable GEORGE W. WICKERSHAM, Attorney General.

Honorable WILLIAM L. WEMPLE, Assistant Attorney General.

ARTHUR B. SHELTON, Clerk.

CHARLES M. AYER, Assistant Clerk.

FRANK H. BRIGGS, Marshal.

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CASES ADJUDGED IN THE UNITED STATES COURT OF CUSTOMS APPEALS.

LUNHAM & MOORE *v.* UNITED STATES (No. 105). CENTRAL STAMPING
CO. *v.* UNITED STATES (No. 272).¹

FLAT PLATES OF STEEL MADE INTO VARIOUS SHAPES—PITCHERS, SPOUTS, ETC.

No commercial designation appearing, a variety of steel shapes ready to be enameled and converted into pitchers, knobs, handles, spouts, etc., is less aptly described as pressed, sheared, or stamped shapes, or as steel in all forms and shapes, than as articles or wares composed of steel, whether wholly or partly manufactured, for to hold otherwise would be to declare the nearly completed articles should have been admitted at the same rate of duty with the original flat sheets of steel; and the importations were dutiable as assessed under paragraph 193, tariff act of 1897.

United States Court of Customs Appeals, May 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York
Abstract 20951 (T. D. 29664), Abstract 18520 (T. D. 28889).

[Affirmed.]

John Giblon Duffy (*Joseph G. Kammerlohr* and *Comstock & Washburn* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

These cases involve the application of paragraphs 135 and 193 of the tariff act of July 24, 1897. It appears from the decision of the board and from such of the samples as have been submitted to us that the merchandise in the case of Lunham & Moore is a variety of steel shapes, such as pitchers, knobs, handles, spouts, covers, etc., and that in the Central Stamping Co.'s case it is metal spouts, such as are used in the manufacture of teapots, teakettles, etc. All of the merchandise is made from what were once flat plates of steel; some exhibits are composed of two or more pieces, and all have been subjected to several processes more or less elaborate according to the nature of the article, and in the form as imported they are articles, each ready and designed to become, after having been enameled, a part of the finished article, such as a kettle, teapot, or other enameled-ware product.

We think it unnecessary to recite fully the several processes to which each article under consideration has been subjected before attaining its present form and shape. It suffices to say that in each instance the original flat shape, form, or plate of steel is cut or sheared to the proper size and form and then by successive processes in machines adapted thereto, which processes are designated as shearing, stamping, pressing, or spinning, as the case may be, the article is made to assume its completed form when imported; and if it is composed of more than one part, these parts are fastened together, and all are ready for the enameling process.

The process of enameling, as appears by the record, in substance, is this: The subject is dipped in a bath of muriatic acid to form a scale, this scale or layer of steel is taken off, then it goes through an acid bath, is pickled, washed, and dried, then receives a coat of enamel, which is allowed to dry, and is then subjected to heat in a furnace, which burns the enamel in.

For convenience, we insert here so much of the respective paragraphs as seems to be pertinent:

135. * * * pressed, sheared or stamped shapes; * * * all descriptions and shapes of dry sand, loam, or iron-moulded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act. . * * *

193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, * * * whether partly or wholly manufactured. * * *

It is claimed by the appellants in each case that these importations are "pressed, sheared, or stamped shapes" of steel or "steel in all forms and shapes" within the meaning of paragraph 135.

The Government contends that the merchandise is more aptly described by the language of paragraph 193 as "articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, * * * and whether partly or wholly manufactured."

We think the appellants' contention can not be sustained.

No commercial designation is claimed or shown; therefore the language under consideration must be given its common and ordinary meaning. We do not think that the terms "pressed, sheared, or stamped shapes" or "steel in all forms and shapes" are so specific or apt a description of the merchandise here as are the words "articles or wares, composed of steel, whether wholly or partly manufactured."

A reading of paragraph 135 clearly indicates that pressed, sheared, or stamped shapes of steel and steel in all forms and shapes aptly applies to the plates, forms, and shapes of steel which are the crude material for subsequent manufacture, and not to the forms and shapes they assume, as in this case, which are the results of such manufacture.

It is clear from the evidence that the processes which the original flat shapes and forms of the steel plate have undergone to produce

the articles here are manufacturing processes; that as a result the articles before us have taken new, different, and distinctive shapes and forms that indicate clearly the purpose for which they are designed and for which only in their present form they can be used. They would not ordinarily be described by the words "pressed, sheared, or stamped shapes, or steel in all forms and shapes," but would more aptly be designated as "unfinished pitchers, handles, knobs, spouts, covers," or such other appropriate name as their shape, form, and intended use would readily suggest, which words of themselves imply the products of manufacturing processes. They have passed beyond the stage of pressed, sheared, or stamped shapes of steel, or forms and shapes of steel within the meaning of paragraph 135, and are articles or wares of steel partly or wholly manufactured.

The appellants place much reliance upon the fact that the processes to which these articles have been subjected are in the main shearing, stamping, and pressing processes, claiming in effect that whatever is so produced is a sheared, stamped, or pressed shape. But this is manifestly fallacious. The evidence shows that, aside from enameling them, entirely finished articles, such as a frying pan, etc., can be produced by the same processes. We think it could not be held that such finished articles were sheared, stamped, or pressed shapes; no more can it be said that the articles involved here which are finished and ready for the enameling process are such shapes. They are each ready in the condition as imported for the immediate use for the object for which it was intended, namely, the subjecting them to the enameling process and then the union with the other necessary parts of a finished article of enameled ware. *United States v. Prosser* (1 Ct. Cust. Appls., 22; T. D. 30848). *Maldonado v. United States* (176 Fed. Rep., 737).

It is urged in argument on behalf of appellants that if the classification of the collector be sustained it results that these articles are subject to a higher duty than the finished product would be, and paragraph 159 of the act of 1897 and decisions of the Board of General Appraisers thereunder are referred to as supporting the contention. It is argued that such a conclusion is inconsistent and that Congress can not be presumed to have intended that the various parts of an article of which enameled ware is made should pay a higher rate of duty than the completed article after it has been subjected to the enameling process.

This, however, can not affect the question. If the appellants' claim be sustained, it results that these nearly finished articles pay no more duty than the original flat sheets of steel of which they are made would pay, a result, as we view it, equally inconsistent.

The judgment of the Board of General Appraisers is *affirmed*.

NEWMAN-ANDREW CO. v. UNITED STATES (No. 149). UNITED STATES
v. NEWMAN ANDREW CO. (No. 152).¹

1. "PLATES" DEFINED.

The testimony in the record is at one with the authority of the lexicons in emphasizing the fact that "plate" both in common parlance and in commerce is used to designate an article distinct from "drawplate," being in fact the thing out of which "drawplates" are made. The term "plate" is not generic, including "drawplate" as a species.

2. DRAWPLATES AND WORTLES, HOW DUTIABLE.

Drawplates and wortles forged from the ingot through various stages and reaching the condition as here imported, namely, the final shape in which they are delivered to the consumer, the adjusting processes to which they are necessarily subjected being merely incidental to the common use of drawplates and wortles, are articles, it is true, of steel, wholly or partly manufactured, but they are more specifically "forgings of steel" and were dutiable, accordingly, under paragraph 127 rather than under paragraph 135, tariff act of 1897.

United States Court of Customs Appeals, May 1, 1911.

CROSS-APPEALS transferred from United States Circuit Court for Southern District of New York, G. A. 6925 (T. D. 29930).

[Modified and affirmed.]

Brown & Gerry for importer, appellant, and appellee.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and De VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

These are cross-appeals from a decision of the Board of General Appraisers.

The merchandise consists of what was termed in the invoice "wortles" and "drawplates."

The drawplates are from 13 to 18 inches long by $4\frac{1}{2}$ to $5\frac{1}{2}$ inches wide and from $1\frac{1}{2}$ to $1\frac{3}{4}$ inches thick. The wortles are approximately 8 inches long by $1\frac{1}{4}$ inches wide and $1\frac{1}{2}$ inches thick. Both are forged from the ingot through various stages to their condition as imported. The so-called drawplate contains 18 holes, one end being hammered down to form a handle, and the wortles 6 holes, all of diminishing diameters, being from $\frac{3}{4}$ to $1\frac{1}{2}$ inches on the face and gradually diminishing to a minute perforation on the back.

The testimony is uniform that each is made by forging processes exclusively and each used as part of a wire-drawing machine.

The collector at the port of New York assessed them for duty as "articles and wares of steel partly or wholly manufactured" under paragraph 193 of the tariff act of 1897. The importers make claim that they are either "plates" or "steel in all forms and shapes," under paragraph 135, or "forgings of steel" under paragraph 127 of the same act.

¹ Reported in T. D. 31570 (20 Treas. Dec., 944).

The pertinent portions of these paragraphs are as follows:

193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, * * * and whether partly or wholly manufactured, forty-five per centum ad valorem.

127. Iron or steel anchors or parts thereof, one and one-half cents per pound; forgings of iron or steel, or of combined iron and steel, of whatever shape or whatever degree or stage of manufacture, not specially provided for in this act, thirty-five per centum ad valorem; antifriction ball forgings of iron or steel, or of combined iron and steel, forty-five per centum ad valorem.

135. Steel ingots, clogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act. * * * (Here follow specific rates of duty.)

The Board of General Appraisers held the drawplates to be dutiable as "plates," basing their decision upon the testimony in the record introduced to prove that they are commercially known as plates. The wortles were held by the board to be dutiable as forgings.

The Government appeals as to the drawplates, and the importer as to the wortles.

The Government here maintains that both are dutiable as "articles of steel partly or wholly manufactured" at 45 per cent ad valorem under paragraph 193.

The importer contends, first, that they are dutiable as "plates" by reason of commercial designation, or as "steel in all forms or shapes not specially provided for" under paragraph 135, or as "forgings" under paragraph 127.

The issues here presented have been the subject of previous decisions by the Board of General Appraisers and the United States Circuit Court of Appeals, Second Circuit. The previous case covered precisely similar merchandise imported by the same importers. In the first case, as in this, the collector assessed the merchandise for duty as "articles of steel" under paragraph 193. On the appeal to the courts from the board the importer waived the contention that the merchandise was "steel in all forms and shapes" and asserted the single claim that they were plates. The Circuit Court of Appeals for the Second Circuit stated that the waiver by the importer deprived his claim of all merit, and held that neither of the articles was within the general scope of the word plate as used in paragraph 135.

The issue again being presented to the Board of General Appraisers, testimony was introduced by the importer with a view to showing that the drawplates were within the commercial signification of plates as used in paragraph 135 and so understood in trade and commerce. There was no testimony even tending to show the trade understanding of wortles. The board held, as above stated, and hence the cross appeals.

Whether or not the court of appeals in the case previously presented to that court passed upon the question of the applicability of trade testimony as affecting the term plates as used in paragraph 135 is a mooted question. The expressions of the court would seem to indicate that it considered the term to have been used in its ordinary signification. Regardless of that issue, however, this court is of the opinion that the testimony introduced by the importer does not show that the imported merchandise, or any part thereof, is comprehended by the term plates as used in paragraph 135.

The testimony shows that the wholesale trade generally, wherein the merchandise is bought and sold, refers to the particular merchandise as "drawplates," "wire plates," "drawing plates," and "wire drawing plates." It appears that in specific instances, when addressing the particular trade, "plates" has been used, but that the general and uniform custom of the trade is to indulge in one of the names stated. Counsel for the importer lays much stress upon the signification of the word drawplate, and quotes the definitions of the various lexicographic authorities in his support. They are as follows:

Webster's International Dictionary:

Drawplate.—A hardened steel *plate* having a hole, or a gradation of conical holes, through which wires are drawn to be reduced or elongated.

Century Dictionary:

Drawplate.—A drilled *plate* of steel or a drilled ruby through which a wire, or a metal ribbon or tube, is drawn to reduce its caliber and equalize it, or to give it a particular shape.

Standard Dictionary:

Drawplate.—A hard *plate* with holes of successively diminishing diameters for drawing out metal rods or wire.

A lexicographic definition of plate given by Lockwood's Dictionary of Mechanical Engineering Terms, which is essentially that given by others, is as follows:

Plate.—A broad, thin sheet of metal.

That definition is in accordance with the common understanding of the term. The definitions of drawplate, quoted by counsel, when read in connection with the definition of plate as quoted, emphasizes perfectly the fact, which is corroborated by every witness who testified, to wit, that drawplate is something more than plate.

Webster defines drawplate as "A hardened steel plate *having a hole, or a gradation of conical holes, * * **" That is to say that it is a plate to which something has been done or added to bring it within the category known as drawplate.

The Century Dictionary states it to be "A *drilled* plate of steel * * *." That is to say that it was originally a plate of steel which has been drilled in such a manner as to at least partially fit it for its subsequent use.

The Standard Dictionary definition implies the same thing. By that authority it is "A hard plate *with holes of successively diminishing diameters* for drawing out metal * * * wire." Here again it is applied with something added, devoting it to a specific purpose.

In every case the material from which drawplate is made is a plate, as defined by the lexicographers, with added processes of manufacture fitting it for a particular use, which when completed give the article a different and distinct name in trade and commerce, to wit, "drawplate."

The testimony in the record perfectly coincides with the lexicographic authorities in emphasizing the fact that "plate," both in common parlance and as understood in trade and commerce, is a separate and distinct article from "drawplate," being the thing out of which "drawplates" are made, rather than a generic term, embracing as a species, "drawplate."

As was stated by the Circuit Court of Appeals in the previous case—

Undoubtedly steel plates were formerly used to draw wires through, and, as is not uncommon, the earlier name clings inappropriately to the later development.

We think that the proper office of paragraph 135 was aptly defined by Judge Hough in *United States v. Buehne Steel Wool Co.* (154 Fed. Rep., 93), wherein the court states:

It seems to me going too far to describe the articles of steel specifically enumerated in paragraph 135 as "crude" or even "simple," for many of them are of complex design and all presuppose great inventive and mechanical skill, and are finished or completed in the sense that they are ready for the markets of the world. But it is true that as a class they are, though the finished products of the mill, *but the raw material for some other metal industry*—for the machine shop or the builder. No article there enumerated is ordinarily used by the final consumer, or put to its ultimate use, by the name or in the shape described by the name used in paragraph 135.

It will be noted in passing that this merchandise is in the final shape in which it is delivered to the consumer, and is not the raw material for further manufacture in any metal industry.

What constitutes forgings has likewise been the subject of much discussion in the courts. The highest and perhaps the most satisfactory deliverance on the subject was by the Supreme Court of the United States in *Saltonstall v. Wiebusch* (156 U. S., 601). The subject of that decision was scythes and grass hooks made out of flat pieces of metal which were shaped by forging, but which required in addition thereto, in order to make them ready for their intended use, the application of other processes than forging. The question was whether they were dutiable as forgings or as articles of steel partly manufactured. While the statute under consideration by the court differed in language from the present, the terms defined are the same. The court said:

From the separate enumeration of "forgings of iron and steel" and "forged iron, of whatever shape or in whatever stage of manufacture," it would seem that Congress intended to distinguish between the two and to apply the term "forgings," though perhaps not exclusively, to such articles as are completed by the action of the hammer.

Hence we are not prepared to accept the theory of the Government in this case that the articles in this paragraph are confined to such as are incomplete or in process of manufacture, as there may be many articles which would naturally fall within the designation of "forgings" which are finished and ready for use—such, for example, as ornamental ironwork, wrought iron railings, and grilles, none of which are subjected to any further process of manufacture. This view is strengthened to a certain extent by the separate enumeration in the same schedule of "anvils, anchors or parts thereof, mill irons and mill cranks, of wrought irons and wrought iron for ships, and forgings of iron and steel, for vessels, steam engines, and locomotives, or parts thereof * * *." Apparently all of these fall within the same category of forgings and apply to completed articles.

But we do not understand the term "forgings" to be applicable to articles which receive treatment of a different kind than hammering before they are complete, such, for example, as grinding, tempering, or polishing, though the witnesses agreed that welding and punching are properly forging processes.

These articles, precisely as imported, are completed and ready for delivery into the hands of the consumer. While it is true that for the consumer's purpose they must be fitted for a particular application by adjusting the smaller orifices of the conical holes to suit the particular size of wire to be made by drawing the wire material through them, nevertheless we do not regard these adjusting processes as other than of those incidental to wortles and drawplates in their everyday use. These operations are such as at frequent intervals during use are applied to all wortles and drawplates for the purpose of adjustment, and not for the purpose of completing the article. That they may be adjusted at the outset by the consumer to fit his purposes, and from time to time as necessity requires, it is necessary that they be placed in the hands of the consumer as imported. These processes are not dissimilar to those applied to various kinds of machinery and implements while in use, adjusting them to the particular purpose of the day, or requirement of the desired product. They are incidents of use rather than of manufacture. Moreover, the record discloses that these very processes, if they may rise to that relative dignity, are essentially forging processes.

For these reasons we find it unnecessary in this case to consider or decide whether or not an incomplete article upon which there have been applied forging processes exclusively should, in order to be classified as a forging, be one upon which the remaining processes necessary to make it a complete article must be forging processes. As imported, we regard this article to all intents and purposes completed. They are forgings, and have had no other than the forging processes applied in their making.

In our view, they are properly dutiable under paragraph 127 as forgings, and not under paragraph 193 as articles of steel, nor under paragraph 135 as plates of steel in all forms and shapes. As between paragraphs 193 and 127, while they might properly fall within either paragraph, the provision "not specially provided for in this act" in

one paragraph neutralizes the equivalent expression in the other paragraph. The terms, therefore, are to be compared without limitation. Articles of steel wholly or partly manufactured include forgings of steel of whatever degree or stage of manufacture and many other articles, whilst forgings of steel constitute but one of the many varieties of articles of steel. The term "forgings of steel," therefore, is the more specific. So, clearly, the phrase "forgings of steel," of whatever degree of manufacture, is more specific than "steel in all forms and shapes." In any event the provisions of paragraphs 135 and 127, extending equally to an imported article, the higher rate of 127 must be applied.

We are of the opinion that the merchandise is properly dutiable as forgings of steel of whatever degree or stage of manufacture under the provisions of paragraph 127. The decision of the Board of General Appraisers is accordingly modified, and as so modified *affirmed*.

UNITED STATES v. AMERICAN THERMO-WARE CO. (No. 190).¹

1. "OR PARTS THEREOF" IN PARAGRAPH 108, TARIFF ACT OF 1897.

Avoiding what would be a conflict between paragraphs 108 and 109 in the tariff act of 1897, the words "or parts thereof" in the former paragraph must be taken to refer not to spectacles, eyeglasses or goggles, but to the frames for these.

2. OVAL-SHAPED GLASSES USED TO MANUFACTURE AUTOMOBILE GOGGLES.

Oval-shaped glasses suitable for use in the manufacture of automobile goggles were dutiable under paragraphs 101 and 107, tariff act of 1897.

United States Court of Customs Appeals, May 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,
G. A. 6961 (T. D. 30266).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellee.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

An importation of oval-shaped glasses, suitable for the manufacture of automobile goggles, was classified by the collector of customs at the port of New York as "ground and polished coquille glasses" and assessed for duty under the provisions of paragraph 109 of the tariff act of July 24, 1897, which paragraph reads as follows:

109. Lenses of glass or pebble, ground and polished to a spherical, cylindrical, or prismatic form, and ground and polished plano or coquille glasses, wholly or partly manufactured, with the edges unground, forty-five per centum ad valorem; if with their edges ground or beveled, ten cents per dozen pairs and forty-five per centum ad valorem.

¹ Reported in T. D. 31571 (20 Treas. Dec., 949).

The importer protested that the goods were not ground and polished coquille glasses, but common window glass, bent, and therefore dutiable under the provisions of paragraphs 101 and 107 of said act, the parts of which paragraphs pertinent to the case are as follows:

101. Unpolished, cylinder, crown, and common window glass, not exceeding ten by fifteen inches square, one and three-eighths cents per pound; * * *.

107. * * * common window glass * * * when bent, * * * shall be subject to a duty of five per centum ad valorem in addition to the rates otherwise chargeable thereon.

The Board of General Appraisers sustained the claim of the importers in this behalf and the Government appealed to the United States Circuit Court for the Southern District of New York, which appeal has been transferred to this court for determination in accordance with the provisions of the tariff act of August 5, 1909.

The evidence submitted on the hearing shows without contradiction and the board finds that none of the glasses are ground or polished. As paragraph 109 covers only lenses and plano or coquille glasses which have been ground and polished, it is evident that the classification and assessment made by the collector can not be sustained.

The Government, however, insists that the merchandise is dutiable under paragraph 108, which is as follows:

108. Spectacles, eyeglasses, and goggles, and frames for the same, or parts thereof, finished or unfinished, valued at not over forty cents per dozen, twenty cents per dozen and fifteen per centum ad valorem; valued at over forty cents per dozen and not over one dollar and fifty cents per dozen, forty-five cents per dozen and twenty per centum ad valorem; valued at over one dollar and fifty cents per dozen, fifty per centum ad valorem.

In our opinion, the contention can not be successfully maintained. The glasses imported are not mounted and therefore can not be considered as spectacles, eyeglasses, or goggles, which terms necessarily carry with them the idea of suitably prepared glass or pebble or similar material so fitted to frames that it can be worn as an aid or protection to the eyes. True, the goods imported are admittedly parts of goggles, but then the question arises as to whether paragraph 108 really provides or was intended to provide for parts of the completed article. We think not. The language "or parts thereof" in the paragraph just mentioned does not refer to spectacles, eyeglasses, or goggles, but to the "frames for the same." Had the phrase "or parts thereof" been intended to relate back to all that preceded it, the conjunction "and" would not have been repeated, and that part of the paragraph would have been made to read as follows: "Spectacles, eyeglasses, goggles, and frames for the same, or parts thereof." Indeed, if it had been intended to impose a duty on spectacles, eyeglasses, goggles, and *parts thereof*, all reference to the frames might well have been omitted, inasmuch as frames are essential parts of the completed articles. Punctuation is not always

a safe guide to the interpretation of laws, as experience shows that they are not infrequently salted and peppered with commas quite at variance with what the lawmaker really intended to say. That "parts thereof" refers to the frames and not to the spectacles, eyeglasses, or goggles themselves, seems to be further borne out by the fact that under the construction urged by the Government paragraphs 108 and 109 would be brought into conflict to some extent; that is to say, ground and polished lenses, plano or coquille glasses, which are constituent *parts* of spectacles, eyeglasses, and goggles, would become dutiable under paragraph 108 as parts of such articles and under paragraph 109 as ground and polished lenses, plano or coquille glasses. We believe that the insertion of the words "or parts thereof" after "frames for the same" was designed to meet a decision of the Board of General Appraisers holding that side pieces or parts of frames could not be assessed as frames under paragraph 119 of the tariff act of 1890, which made provision for spectacle and eyeglass frames, but not for parts thereof. (T. D. 11374.) True, the amendment was not made in the tariff act immediately succeeding the decision; but, as defects in laws are not always promptly remedied, a failure to amend at the first opportunity scarcely justifies the inference that the defects were not in the legislative mind when, on a subsequent occasion, language was used adequate to remedy them.

The decision of the Board of General Appraisers is *affirmed*.

WOLFF v. UNITED STATES (No. 382).¹

JEWELRY AND IMITATION JEWELRY.

Where the importation consists of merchandise in a variety of forms, necklaces, chains, hatpins, etc., made of a variety of materials and some complete, some incomplete, without attempting a comprehensive definition of jewelry or of articles commonly known as jewelry, the appeal here being limited to merchandise represented by enumerated samples, and there being no evidence to controvert the conclusion drawn by the board, the board's decision must be affirmed; the goods were properly assessed, being commonly known as jewelry, under paragraph 434, tariff act of 1897.

United States Court of Customs Appeals, May 1, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22013 (T. D. 30069), Abstract 22048 (T. D. 30086).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Charles Duane Baker on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The decision in this case involves questions of fact, as well as conclusions of law.

¹ Reported in T. D. 31572 (20 Treas. Dec., 951).

The merchandise, the subject of the decision of the Board of General Appraisers, consisted of a great variety of necklaces, chains, hatpins, beads, combs, slides, snaps, pendants, hearts, stones, and other kindred articles. The merchandise was in a variety of forms, and made from a variety of materials and compositions of materials. Some of the articles are partly finished and others complete.

There was no testimony introduced before the Board of General Appraisers. So far as this record shows, the merchandise was returned by the collector as jewelry and parts of jewelry.

The board in two decisions made the following findings of fact. These findings of fact are essentially the whole of the opinion of the board in each case:

1. Necklaces and chains composed in chief value of glass beads, valued at more than 11 marks per gross.
2. Hatpins with decorated metal scrollwork heads, commonly known as jewelry.
3. Glass beads temporarily strung.
4. Combs with gold-plate tops, commonly known as jewelry.
5. Pendants, commonly known as jewelry or parts thereof.
6. Necklace clasps set with imitation precious stones, commonly known as jewelry.
7. Beaded wearing apparel.

In the other decision, subject of this appeal, the board found the merchandise to consist of—

1. Beaded cotton plates for bags and elastic belts ornamented with beads.
2. Glass beads, strung.
3. Necklaces and long chains valued at more than 11 marks per gross.
4. Slides and snaps composed of gilt metal set with imitation precious stones.

We learn from the unchallenged statement in appellant's brief that—

The protests were submitted upon the appraiser's reports and the official samples.

The brief of the appellant makes the further statement:

The official samples are far from complete, in that they are not representative of all of the articles passed upon by the board, but they may be said to be complete as to the class of goods to which this appeal may be limited. For convenience, they may be classified in two groups:

(a) Pendants, snaps, and "hearts," composed of imitation pearls, or imitation precious stones, as shown by the two samples in protest 335163; the five samples in protests 332677-9; and the five samples in protests 328730-2, all of which class of articles are aptly described by the words "imitation of precious stones, set."

(b) The necklace in protest 352291, composed of paste and base metal. Articles of this character, if they may be regarded as jewelry in any sense of the word, are accurately described by the words "imitation jewelry."

Samples corresponding with the numbers enumerated in lists (a) and (b) of appellant's brief are before the court. With a single exception they constitute all of the samples before us. A comparison of these samples with the list of merchandise covered by the two decisions of the board here the subject of appeal readily shows that the samples before the court constitute but a minor portion of the merchandise the subject of these two decisions.

The appeal therefore may be considered as limited to the classes of goods represented by the samples before us and to the protests covering the merchandise represented by those samples. Of the 23 protests the subject of these appeals these considerations limit the appeals to the eight protests enumerated in the appellant's brief. These samples as described by the appellant are pendants, snaps, and "hearts," and the necklace in protest 352291. The appeals must be further limited under the circumstances to those classes of pendants, snaps, and "hearts" covered by these protests which are similar to and represented by the official samples before us.

The only method of identification of these samples with the findings of the board is by a process of elimination. As will be seen, there are no "hearts" covered by the findings of the board. They may in the form of these samples be considered pendants, but the fact that both "pendants" and "hearts" are enumerated in the language of appellant in limiting the appeals would preclude that assumption. In our view of the case, however, this becomes immaterial. These appeals therefore will be considered as limited to that class of pendants and snaps and the necklace as represented by the samples before us upon the invoices covered by the protests enumerated hereinafter.

The pendants may be briefly described as consisting as follows:

In protest 335163 pendants of imitation turquoise and imitation pearl, both in a metal setting ready to be attached to a chain or other article of which they are intended to form a part.

In protest 332677 pendants of imitation rubies, set similarly to the above.

In protest 332678 metal snaps for fastening parts of articles together surrounded by imitation turquoise.

In protest 332679 pendants of imitation pearl set identically with those above described.

In protest 328730 pendants of imitation coral set similarly to pendants above described.

In protest 328731 the articles consist of "hearts" in imitation of rubies and topaz. Each sample has affixed therein staple and ring ready for attachment to the other portion of the article of which it may become a part. These samples can not be precisely identified, as stated, with any finding of the board, though they probably were included within the designation pendants.

In protest 328732 pendants in imitation of pearl set similarly to the pendants above described.

The necklace the subject of protest 352291 is composed of paste and base metal. It is made in imitation of jet.

The imitations of the various precious stones are not of a superior quality, nor are the settings or fastenings of either superior metal or workmanship. The goods may be said to be of a common, cheap

class of such articles, or parts thereof, intended manifestly from their appearance and construction to be worn as jewelry, or it might be conceded imitations of jewelry.

Assuming these samples to be representative of the merchandise the subject of the findings of the board, they would be included within, first, the decision in the case of protest 323712, etc., finding V, as "pendants commonly known as jewelry or parts thereof;" and, secondly, finding III, in the decision of the board in protest 267642, of "necklaces and long chains valued at more than 11 marks per gross;" and, third, finding IV, in the last named decision, for "snaps composed of gilt metal set with imitation precious stones."

The appeal being limited to the merchandise represented by the samples enumerated, and *it being expressly admitted* by appellant that these samples are covered by findings of the board in these cases, whether the identification here made is accurate or otherwise, it follows that a case is presented wherein the board had before it samples of the merchandise, made a finding of fact with reference thereto, drew a conclusion of law from these findings, and no evidence has been introduced to overcome the same, nor is there any evidence presented by this record which controverts the same.

Whether the article is commonly known as jewelry within paragraph 434 of the tariff act of 1897 is a question of fact to be determined by the board. It is a question of fact susceptible of proof or disproof by evidence. As to the character of that evidence this court is not now called upon to decide. We agree with the United States Circuit Court of Appeals for the Second Circuit in the case of *United States v. Schiff* (139 Fed. Rep., 549), wherein, in construing paragraph 434, the court said:

We do not deem it important to attempt a comprehensive definition of the word "jewelry" or of the phrase "articles commonly known as jewelry." The only relevant question now before the court is, Were the articles in controversy, at the date of importation, commonly known as jewelry? If they were so known the collector was right; if not, the board and circuit court were right. The question is one of fact and we see no reason to disturb the finding of the board * * *.

Appellant's brief contains an extended review of the various tariff provisions from the foundation of the Government to and including the act under consideration, with a view to showing that Congress has always contemplated as different entities for tariff purposes jewelry and imitation jewelry, precious stones and imitation precious stones. That is undoubtedly true. Numerous of these acts, however, show that Congress expressly classified imitation jewelry in the same category with jewelry, and imitation precious stones in the same category with precious stones. This, however, in our opinion, does not preclude the possibility of all of these articles, whether genuine or imitation, being commonly con-

sidered as jewelry. It is a matter of common knowledge and everyday observation of those in a position to observe that all classes of these articles are made by jewelers and carried in jewelry stores. Without deciding this point, however, which we deem here unnecessary, we do not find in this record sufficient or any evidence to disturb the findings made by the Board of General Appraisers. For that reason the decision of the board is *affirmed*.

BRODY *et al.* v. UNITED STATES (No. 413).¹

BASKETS MADE OF WILLOW WOOD—EO NOMINE RULE.

Manufactures of willow are covered by paragraph 212, tariff act of 1909, and baskets of wood are covered by paragraph 214 of that act. Applying the recognized doctrine that an *eo nomine* provision is more specific than one of general description, it must be held that the term baskets of wood, willow being concededly wood, is more specific than manufactures of willow, and baskets made of willow wood are dutiable under paragraph 214 of the act in question.

United States Court of Customs Appeals, May 1, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23579 (T. D. 30733).

[Reversed.]

Brown & Gerry for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue here is whether baskets made of willow are dutiable under paragraph 212 or paragraph 214 of the tariff act of August 5, 1909. The respective paragraphs are as follows:

212. Chair cane or reeds wrought or manufactured from rattans or reeds, ten per centum ad valorem; osier or willow, including chip of and split willow, prepared for basket makers' use, twenty-five per centum ad valorem; manufactures of osier or willow and willow furniture, forty-five per centum ad valorem.

214. Porch and window blinds, baskets, curtains, shades, or screens of bamboo, wood, straw, or compositions of wood, not specially provided for in this section, thirty-five per centum ad valorem; if stained, dyed, painted, printed, polished, grained or creosoted, forty per centum ad valorem.

The baskets were classified and assessed by the collector under paragraph 212, and his action was sustained by the Board of General Appraisers.

Concededly, the baskets are manufactures of willow and they are also baskets of wood, using the term wood in its common, general, and botanical sense.

The Board of General Appraisers, for reasons which are set forth in their decision, held that Congress in the tariff act of 1909 "has said

¹ Reported in T. D. 31573 (20 Treas. Dec., 955).

that for tariff purposes willow is not wood." In its last analysis such is the contention of the Government before us.

It is conceded that prior to the act of 1909 there was no *eo nomine* provision for baskets of wood, such as we now find in paragraph 214, and it seems that baskets like these had by the board and the courts been theretofore held classifiable for duty under paragraph 206 of the act of 1897, which was as follows:

206. Chair cane or reeds, wrought or manufactured from rattans or reeds, ten per centum ad valorem; osier or willow prepared for basket makers' use, twenty per centum ad valorem; manufactures of osier or willow, forty per centum ad valorem.

In view of these holdings and of the provisions of other paragraphs of the tariff act to which our attention is called, the Government urges that it must be held that Congress intended that baskets of willow should be excluded from baskets of wood and remain subject to the provisions of paragraph 206 of the act of 1897, as reenacted in paragraph 212.

Comparing this with paragraph 212, it will be observed that paragraph 206 has been extended by adding to osier or willow prepared for basket makers' use "chip of and split willow" and by adding "willow furniture" to manufactures of osier or willow.

It will of course be borne in mind that paragraphs 212 and 214 were contemporaneously enacted by Congress, so that one equally with the other is the latest expression of legislative intent.

Applying the recognized doctrine that an *eo nomine* provision is more specific than one of general description, it must be held that the term "baskets of wood," willow being concededly wood, is more specific than manufactures of willow. Basket is the specific name of the article involved here, while the term "manufactures of" is a general term applying to other manufactured articles as well as baskets.

Had not the provisions of paragraph 214 been incorporated in the act of 1909, it might be sound argument to urge that it should be presumed that Congress intended that the interpretation which had theretofore been given to the provisions of paragraph 206, so far as relates at least to willow baskets, would be continued and applied to the provisions of paragraph 212. But it will also be presumed that Congress took cognizance of the well-known rule of interpretation applied by the courts to tariff statutes—namely, that an *eo nomine* provision would control over a general description and, having seen fit to refer to baskets of wood *eo nomine*, the presumption loses its force.

By expressly including manufactures of willow in paragraph 212 Congress has excluded them from paragraph 214; but by specifically providing for baskets of wood in paragraph 214 they are excluded from paragraph 212. If it had been the intent of Congress to exclude from paragraph 214 baskets made of willow, it were easy to have used apt language for that purpose. If it had been intended to

include willow baskets in manufactures of willow, it was as easy to have said so in paragraph 212 as it was to add the words "and willow furniture" thereto, which clearly indicates that willow furniture, otherwise classifiable under paragraph 215 of the act of 1909 relating to house or cabinet furniture of wood, should nevertheless be classified under paragraph 212.

We think by its plain, unambiguous language Congress has said that baskets of wood which include willow shall be dutiable under paragraph 214.

A more exhaustive discussion of the controlling principles of this case may be found in *Krauss v. United States* (T. D. 31574), heard at our February (1911) session, in which we reach a like conclusion.

We hold that the baskets in this case are dutiable under paragraph 214 of the act of 1909, and the decision of the Board of General Appraisers is therefore *reversed*.

KRAUSS & Co. v. UNITED STATES (No. 421).¹

1. "WILLOW" DEFINED.

"Willow" is used botanically, colloquially, and commercially to describe a kind of wood.

2. ARTICLES MADE OF WOOD, PARAGRAPH 214, TARIFF ACT OF 1909.

It would seem to have been the purpose of the Congress in enacting paragraph 214, tariff act of 1909, to constitute a new class for all baskets made of any kind of wood, and instead of continuing a former provision whereby different kinds of wooden baskets should be classified differently and with differing rates of duty to make all wooden baskets dutiable at the same rate; and market baskets and hampers made of willow are dutiable not as manufactures of willow, but, according to the more specific of two possible designations, as baskets of wood and under said paragraph 214.—Zinn case (T. D. 24811) and others distinguished.

United States Court of Customs Appeals, May 1, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23619 (T. D. 30754), Abstract 23756 (T. D. 30828).

[Reversed.]

Walden & Webster for appellant.

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

On August 25, 1909, the appellants imported into this country a consignment of willow baskets of two kinds, namely, market baskets and hampers.

The market baskets were such as are well known by that name and hardly require any further description; the hampers were upright

¹ Reported in T. D. 31574 (20 Treas. Dec., 957).

four-cornered baskets standing upon board bottoms, having also willow lids, and commonly used as shipping baskets or to hold soiled clothes for the laundry. The willow twigs or wands composing the baskets had been peeled but not split.

There was no other kind of baskets in the shipment.

The collector held the importation to be dutiable at 45 per cent *ad valorem* as manufactures of willow, under paragraph 212, act of 1909, which reads as follows:

212. Chair cane or reeds wrought or manufactured from rattans or reeds, ten per centum *ad valorem*; osier or willow, including chip of and split willow, prepared for basket makers' use, twenty-five per centum *ad valorem*; manufactures of osier or willow and willow furniture, forty-five per centum *ad valorem*.

The appellants duly filed their protest to this assessment and contended that the baskets were dutiable at 35 per cent *ad valorem* as baskets of wood, under paragraph 214, which reads as follows:

214. Porch and window blinds, baskets, curtains, shades, or screens of bamboo, wood, straw, or compositions of wood, not specially provided for in this section, thirty-five per centum *ad valorem*; if stained, dyed, painted, printed, polished, grained, or creosoted, forty per centum *ad valorem*.

The appellants included also some other claims within their protest, but all such have been withdrawn and the contention above stated is the only one upon which they rely.

The board duly heard the protest on evidence and overruled the same as to the market baskets, but sustained the same as to the hampers on the ground that they were house furniture wholly or in chief value of wood, and were therefore dutiable at 35 per cent *ad valorem* under paragraph 215, which reads as follows:

215. House or cabinet furniture wholly or in chief value of wood, wholly or partly finished, and manufactures of wood or bark, or of which wood or bark is the component material of chief value, not specially provided for in this section, thirty-five per centum *ad valorem*.

A petition for rehearing was filed by the Government, and the board thereupon held, in effect, that their decision concerning both baskets was incorrect, and that both should be classified as willow furniture, under paragraph 212, *supra*, and were therefore dutiable at 45 per cent *ad valorem*.

The appellants complain that this action of the board was taken without first giving them any kind of notice, and actually without knowledge on their part, and that the decision was therefore void for want of jurisdiction.

However, as the nominal result of the proceedings, the board held the entire importation to be willow furniture, dutiable at 45 per cent *ad valorem*, and the appellants contended that the articles were baskets of wood dutiable at 35 per cent *ad valorem*.

It seems clear that the board erred in classifying these baskets as willow furniture. The record contains all the evidence taken in the case, and the uncontradicted testimony is that the baskets were not known in trade as furniture, or as willow furniture, but only as baskets, and that they were not handled by furniture dealers, but only by merchants who dealt distinctively in baskets. The exhibits also fully sustain this testimony.

This, therefore, negatives the second finding of the board. However, it is not conclusive of the case, because the same paragraph which provides for willow furniture also provides for manufactures of willow and fixes the same rate of duty for both. The Government contends that the baskets are manufactures of willow, if not also willow furniture, and therefore that the decision of the board reaches the right result and should not be disturbed.

The case, therefore, thus assumes a new aspect and presents this secondary question: Are the baskets to be classified as baskets of wood or as manufactures of willow?

The articles may certainly be described as manufactures of willow; but if they are also baskets of wood, then and in such case that designation would prevail, since the description "baskets of wood" is obviously more specific than "manufactures of willow." The question therefore really is whether the articles are baskets of wood as well as manufactures of willow.

It is conceded that the articles are baskets, and that they are manufactured from whole willow twigs or sprouts, the hampers having board bottoms.

It can hardly be denied that willow is a kind of wood, as the two words are used colloquially, botanically, and commercially. This statement is sustained by the fact that all of these provisions appear in "Schedule D—Wood and manufactures of." The board also adopted this meaning of the words in its first decision, wherein it held that the baskets were house furniture, wholly or in chief value of wood. But the Government contends that whatever may be the meaning of the words wood and willow in other constructions, in tariff legislation the purpose is made clear that willow shall not be classed as a kind of wood, and that whenever the word wood alone is used it shall not be understood to include willow. Therefore it is argued that these baskets, although made of willow, are not baskets of wood, within the meaning of the act. This conclusion is said to follow from certain former decisions of the board and of the courts, and from a study of the changes in the tariff laws following the decisions, and from a comparison of the different parts of the act treating of this subject matter. The decisions which are thus referred to were made upon the act of 1897, before the passage of the present law. They will be briefly examined in their relation to this question.

In the first Zinn case (T. D. 24811, Nov. 27, 1903) the board held that where willow had been split by a certain process it became commercially known as chip, and ceased to be known as willow, and therefore that baskets made of such material should be classified as baskets of chip rather than as manufactures of willow.

In the second Zinn case (T. D. 27208, Mar. 13, 1906) it was stated by the board that the foregoing decision was based upon partial and incomplete evidence, and upon the evidence submitted in the case at bar it was held that baskets made from such split willow were not manufactures of chip, but were manufactures of willow, the first decision being thus overruled.

In the Ollesheimer case, Abstract 2453 (T. D. 25499, July 27, 1904), the same question was again made, and the board adhered to its second decision. This was affirmed by the circuit court (154 Fed. Rep., 167), the court saying that the case seemed to be merely an effort to relitigate the Zinn cases, and that no reason appeared for departing from the second decision. This case was further affirmed by the Circuit Court of Appeals (158 Fed. Rep., 977) upon substantially similar grounds.

In all of these cases there was but a single question made and it was largely one of fact. The act had provided separate rates of duty for manufactures of willow and manufactures of chip; and the question was which designation more properly included baskets made of split willow. The testimony related most largely to trade usage of the word "chip." There was no mention in the act of baskets *eo nomine*, whether of wood or willow; nor was the question made whether willow was or was not a kind of wood. The cases, therefore, do not seem to go very far in the direction claimed for them.

It appears that the sections relating to these and like manufactures were modified when transferred from the act of 1897 to that of 1909; and it is contended that these changes show a legislative recognition of the principles of the above cases and a purpose to enact them into statute law.

This contention does not require very extended discussion, because the cases themselves do not touch upon the question at issue, and the implied approval of them by Congress is, therefore, no authority in relation to the present question.

It is also claimed that if willow baskets were held to be baskets of wood the meaning of paragraph 212 would be largely destroyed, especially that part providing for "manufactures of osier or willow." This hardly seems to follow, for manufactures of osier or willow is a general description covering many other articles besides baskets, and to withdraw that one class of articles from its operation can not be said to destroy the meaning of the entire paragraph.

In paragraph 215 Congress made "furniture wholly or in chief value of wood" a class with 35 per cent ad valorem duty; and in paragraph 212 "willow furniture" was made a class with 45 per cent ad valorem duty. In respect to furniture, therefore, willow furniture and furniture of wood were treated separately; but this fact does not lend very substantial support to the broad claim that Congress had adopted a nomenclature for the entire act whereby willow should be wholly taken from its genus wood.

It is rather a bold claim to make in any case that a word used in a statute has been deprived of the meaning which is at once its common, scientific, and trade meaning and given an arbitrary one, such as can be determined only by a technical study of judicial decisions and of comparative legislative enactments. Such action is of course within legislative authority and such authority is doubtless sometimes exercised, but in this case such a conclusion does not seem to follow from the actual premises.

In the act of 1897 baskets did not appear *eo nomine*. Therefore willow baskets were held to be included within the provision for manufactures of willow, and baskets of other woods were included within the provision for manufactures of wood. It is therefore true that they were given separate classifications and different duties by that act. But this result did not follow from any language which could carry the meaning that willow was not regarded at all as wood. For it frequently happens that a class of articles made from a given material is made an exception to the general rule adopted for such material when admittedly the class would be governed by the general rule in the absence of such a provision.

Now, if Congress had intended that the former difference should continue in the law of 1909, it is reasonable to suppose that the same language would be used. But instead of that the word "baskets" is injected into the act, in the "wood manufactures" paragraph, and not in the "willow," when plainly a large percentage of willow would be used in baskets and a large percentage of baskets would be made of willow; and when the word "baskets" as used would add nothing to the law as it stood unless it applied to willow baskets, as well as to those made from other kinds of wood, and when the common understanding would be that baskets of wood should include baskets of willow. This action of Congress seems to imply a purpose to establish all baskets as a new class, if made of any kind of wood, and to make them all dutiable at the same rate, instead of continuing the former provision whereby different kinds of wooden baskets should be classified differently.

According to this view the importation is more specifically described as baskets of wood, and the protest should have been sustained.

This conclusion makes it unnecessary to consider the question of practice raised in relation to the rehearing had by the board without notice to the appellants.

The decision of the board is therefore *reversed*.

BRAGG v. UNITED STATES (No. 485).¹

IMPORTATION OF AMERICAN PRODUCTS THERETOFORE EXPORTED.

Certain animals, American products, were exported while the tariff act of 1897 permitting the free entry of these on return to the United States was in force; these animals were returned to the United States subsequent to the enactment of the tariff law of 1909, by which free entry was denied an importation of this kind. *Held*, a tariff law creates no vested rights to import free or at any particular rate of duty goods, wares, merchandise, or products of any kind; no contractual obligation had been incurred by the taxing power incapable of being impaired by a subsequent modification or repeal of the provision in question; the law in force at the date reentry was sought applies and the importation of animals was properly held dutiable under paragraphs 225 and 227, tariff act of 1909.—*Campbell v. United States* (107 U. S., 407) distinguished.

United States Court of Customs Appeals, May 1, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23875 (T. D. 30879).

[Affirmed.]

Stanley Jackson for the appellant.

D. Frank Lloyd, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

SUBMITTED ON BRIEFS.

SMITH, Judge, delivered the opinion of the court:

On certain dates in the years 1906, 1907, and 1908, there was exported from the United States to Mexico, through the port of Calexico, Cal., in the collection district of San Diego, certain live stock, to wit, 2 mares, 1 stallion, 1 gelding, and 30 head of steers. The Treasury regulations having been complied with at the time of exportation, the animals, as American products, became entitled on their return to the United States to free entry under the provisions of section 2 and paragraph 483 of the tariff act of 1897, the material parts of which read as follows:

SEC. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty:

* * * * *

483. Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; * * * but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury. * * *

¹ Reported in T. D. 31575 (20 Treas. Dec., 962).

Subsequent to the exportation of the animals this part of the provision was modified by the tariff act of August 5, 1909, so as to read as follows:

FREE LIST.—That on and after the day following the passage of this act, except as otherwise specially provided for in this act, the articles mentioned in the following paragraphs shall, when imported into the United States or into any of its possessions * * * be exempt from duty:

* * * * *
500. Articles the growth, produce, or manufacture of the United States, *not including animals*, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; * * * but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury. * * *

In view of this change in the free list the collector of customs, on the return of the animals to the United States in October, 1909, refused to admit them "free" and assessed them for duty under the provisions of paragraphs 225 and 227 of the act of August 5, 1909, which was the tariff law in force at the time of importation. The importer protested that as all the requirements of the regulations prescribed by the Secretary of the Treasury to entitle the animals to exemption from duty on their return had been complied with at the time of their exportation they were not subject to duty and that the subsequent passage of a new tariff act could not affect their non-dutiable status. The Board of General Appraisers overruled the protest and the importer appeals.

The facts of the case as above recited are admitted, and on them the importer urges, as a matter of law, first, that having done everything required by the existing statute and regulations to entitle the live stock to exemption from duty on their return, the right to enter them free vested at the time of exportation and that of that right he could not be divested by subsequent legislation; second, that having met the statutory conditions prescribed for the free entry of American products on their return to the United States, the Government was bound to admit them by a contractual obligation which could not be impaired by a *post facto* enactment; and, third, that whether or not a vested right or contract existed paragraph 500 should be so construed as to obviate the infliction of a hardship on the importer.

As to the first point, it is sufficient to say that tariff laws create no *vested rights* to import free or at any particular rate of duty goods, wares, merchandise, or products of any kind. While such laws are in force a right to import, as therein provided, may be said to exist; but its continued enjoyment is dependent on the continuance of the law which gave it, and therefore it can not be considered as vested in the sense that it has become property of which the owner can not be deprived without due process of law. The citizen has no *vested rights* in statutory exemptions from taxation, and such exemptions

are always subject to recall when they have been extended as a privilege and not granted for a consideration received by the public. (Cooley's Const. Lim., 546, 547; Cooley on Taxation, 111.) The taxing power of the Government is limited only by the Constitution, and in the exercise of that power that which is exempt from tax or duty to-day may be made taxable or dutiable to-morrow if Congress so wills it. The act of August 5, 1909, expressly repealed all acts and parts of acts inconsistent with its provisions, and must be considered as substituting all previous tariff legislation except as therein otherwise specially provided. It makes all articles not included in the free list dutiable; it expressly levies a duty on cattle and horses, and in terms excludes from the free list American animals exported and returned. As the animals in question were imported after the act of August 5, 1909, went into effect, it would seem that they were subject to its provisions and not to those of the act of July 24, 1897, which was no longer in force. Section 483 of the latter act, under which they might at one time have been admitted free, lost its vitality and power on August 6, 1909, and the authority to galvanize it into life rests with the legislature and not with the courts, which clearly can not restore to it a force once possessed, but which Congress expressly declared it should no longer have.

This brings us to the consideration of the second point urged by counsel for the importer, namely, that paragraph 483 of the act of 1897, while it was in effect erected a valid contractual relation between the Government and the importer and imposed on the former an obligation which could not be impaired by any repeal or modification of the provision. In our opinion, the paragraph was nothing more than an exercise of the taxing power of the Government and had none of the indicia or essential characteristics of a contract. True, the courts *have* held that where for a consideration any citizen is exempted from the payment of future taxes or is required to pay a special tax in lieu of other taxes, provision for such exemption or special tax amounts to a contract between the citizen and the Government which can not be affected by subsequent legislation in conflict with its terms. It will be noted, however, that in all the decisions on this subject it has been held that no such exemption will hold good so as to restrict the taxing power of the Government unless it be coupled with a consideration or unless the contract has been finally and completely executed, in which case no consideration would be required to support it. (*Farrington v. Tennessee*, 95 U. S., 679; *Bank of Commerce v. Tennessee*, 161 U. S., 134.) In this case the exemption from duty of American animals exported from the United States and returned was not granted to the importer by reason of any consideration moving from him to the State, and consequently there

was no binding obligation on the part of the Government to refrain from subsequent legislation which would make them dutiable. As it is admitted that to bring the importer within the provisions of paragraph 483 importation of the animals was necessary, and as the animals were not imported during the life of the paragraph, the relations between Government and importer could scarcely be regarded by any court as those of parties to an executed contract.

The case of *Campbell v. United States* (107 U. S., 407), cited by appellant, has no application here. There the law permitting a drawback was in full force at the time the importer had fully complied with the conditions which entitled him to a return of the duties paid. Here the law under which the importer claims had been repealed at the time he sought to avail himself of its provisions. There the importer paid his money to the Government on the statutory promise that it would be returned when he had complied with certain conditions. Here nothing passed from the importer to the Government, and consequently consideration, one of the essentials to convert an exercise of the taxing power into a contractual obligation, is wanting. There the transaction partook of the nature of a deposit for security, differing in no material way from other deposits made with the Government and which it binds itself to return on compliance with the conditions prescribed by its laws. Here there was nothing more than the withdrawal of a mere exemption secured to the importer by no consideration and wholly dependent for its continuance on the public interest as Congress saw it.

As to whether section 500 should be so construed as to obviate the infliction of hardship on the importer we can only suggest that mere hardship or even injustice of and by itself is not enough to justify an interpretation which, while avoiding the hardship or injustice, would violate the plain intent of Congress. The Legislature expressly excluded American animals from the benefit of paragraph 500 in language admitting of no doubt as to the intention of the lawmaker, and under such circumstances any change in that language which would bring about a different result from that which its plain meaning imports would be judicial legislation.

We are of the opinion that whatever rights the importer had under the act of July 24, 1897, were terminated by the act of August 5, 1909; that no contractual relation existed between the Government of the United States and the importer, and that the language of Congress excluding returned American animals from the free list is so clear and explicit as to leave no doubt that the law fully intended to subject them to duty.

The decision of the Board of General Appraisers is therefore *affirmed*.

BRECK & SON v. UNITED STATES (No. 487).¹

1. "HYACINTH" IN PARAGRAPH 261, TARIFF ACT OF 1909.

The only assignable reason for the change of "hyacinths" in paragraph 251, tariff act of 1897, to "hyacinth" in paragraph 263, tariff act of 1909, is the word in the last case was employed as an adjective and not a noun, and "hyacinth" in the connection there used must accordingly take its grammatical construction as an adjective; and this more especially as there is nothing to indicate a contrary intent in framing that paragraph.

2. HYACINTH CLUMPS.

Hyacinth clumps are clusters of roots or bulbs joined together and are within the ordinary meaning of the word "clumps."

3. HYACINTH BULBS.

A comparison between the former law and the later form of it seems to make it clear the importation was dutiable not as hyacinth, and so taking a higher duty, but as bulbs from which clumps are propagated, at a lesser rate of duty, under paragraph 261, tariff act of 1909.

United States Court of Customs Appeals, May 1, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7085 (T. D. 30875).
[Reversed.]

Brown & Gerry and Curtis Nye Smith for appellants.

D. Frank Lloyd, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Hyacinth bulbs imported from Holland were assessed for duty by the collector of the port at Boston at the rate of \$2.50 per thousand as "hyacinth" under paragraph 263 of the tariff act of 1909.

The paragraph reads:

263. Orchids, palms, azaleas, and all other decorative or greenhouse plants and cut flowers, preserved or fresh, twenty-five per centum, ad valorem; lily of the valley pips, tulip, narcissus, begonia, and gloxinia bulbs, one dollar per thousand; hyacinth, astilbe, dielytra, and lily of the valley clumps, two dollars and fifty cents per thousand; lily bulbs and calla bulbs, five dollars per thousand; peony Iris Kämpferii or Germanica, canna, dahlia, and amaryllis bulbs, ten dollars per thousand; all other bulbs, bulbous roots or corms which are cultivated for their flowers or foliage, fifty cents per thousand.

The importer, appellant here, maintains that they are dutiable at 50 cents per thousand under the last provision of the same paragraph, "all other bulbs." The Board of General Appraisers overruled the protest.

The determination of this issue, which is one essentially of construction of law, will be aided by an examination of paragraph 251 of the tariff act of 1897, of which the foregoing paragraph was the successor.

¹ Reported in T. D. 31576 (20 Treas. Dec., 966).

Paragraph 251 of the tariff act of 1897 reads as follows:

251. Orchids, palms, dracaenas, crotons and azaleas, tulips, hyacinths, narcissi, jonquils, lilies, lilies of the valley, and all other bulbs, bulbous roots, or corms, which are cultivated for their flowers, and natural flowers of all kinds, preserved or fresh, suitable for decorative purposes, twenty-five per centum ad valorem.

The conclusion herein reached is dependent upon whether or not the word "hyacinth," as used in paragraph 263, *supra*, is used as an adjective modifying the word "clumps," in the same paragraph, or as a noun, embracing therewith all merchandise covered by its import.

The scheme of enactment adopted in the act of 1897 obviously differs from that adopted in the act of 1909. In the act of 1897 plural nouns were used covering the various classes of merchandise intended to be made dutiable, followed by a modifying phrase defining the precise application in which the preceding nouns were employed by Congress. The plan of the act of 1909 differs. The subjects of legislation were divided in accordance with the rate to be applied, those assessed at the same rate being included in the same brackets, the brackets being divided by a semicolon. The first bracket followed the scheme of the act of 1897 by using nouns with a general modifying phrase and applying the same ad valorem rate. The remaining brackets adopted the adjectival plan. In the whole scheme, with reference to these brackets, excepting the first, a change from the plural in the act of 1897 to the singular in the act of 1909 was adopted.

A change of legislative method is always deemed a change of meaning.

The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the preexisting law, and the presumption must be that it was intended to change the statute in all particulars touching which we find a material change in the language of the act. *United States v. Bashaw* (50 Fed. Rep., 749) and *Rothschild v. United States* (179 U. S., 463).

The only conceivable reason for the changing of the word "hyacinths" from the plural in the act of 1897 to the singular in the act of 1909 is to make it an adjective instead of a noun. Strength is added to this conclusion by the fact that if the word is used in the act of 1909 as a noun, it is used differently from the manner in which similar words are customarily used in tariff acts, for when used as a noun descriptive of merchandise *eo nomine* such words are customarily used in the plural. If the nounal rather than the adjectival sense is to be given the word "hyacinth," as used in paragraph 263, it will differ from the obvious sense in which all such words are used in the framework of that paragraph and will stand alone as the one noun used in the paragraph in the singular rather than in the plural, and the one word used as a noun in several precisely similar texts.

That Congress considered "hyacinth" and the corresponding words in the paragraph used in an adjectival sense modifying the words "clumps" and "bulbs" at the end of each of the brackets is shown by the insertion of the word "pips" after the words "lily of the valley" in the second bracket. It would have been unnecessary if the words "lily of the valley" were used in the nounal sense and the word "bulbs" were modified by the word "gloxinia" only. The same inference is gathered from the second enumeration of "lily of the valley clumps" in the third bracket. If these words were used by Congress in the nounal sense, as contended by the Government, the single use of the words "lily of the valley" in the second bracket, without being followed by the word "pips," would have been sufficient to embrace lily of the valley clumps, pips, or bulbs, if the contention of the Government is true.

The grammatical construction of the phrase concedes to the word "hyacinth" an adjectival sense modifying the word "clumps."

It is a well-settled rule of construction that the grammatical sense must be adopted unless there are within the statute cogent reasons indicating a contrary intent upon the part of the lawmakers.

In Endlich on the Interpretation of the Statutes, section 2, it is stated:

The first and most elementary rule of construction is, * * * and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that the interpretation does not give the real intention of the Legislature.

. More definitely applied, the same authority in section 414, after citing and reviewing many adjudged cases in point, states:

Indeed, in most cases, it will be found, on some ground of this sort, that, where several words are followed by a general qualifying expression which is as much applicable to the first as to the last, that expression is not limited to the last, but applies to all.

In Lewis's Sutherland Statutory Construction, section 408, the rule is affirmed in this language:

Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning. This presumption gives way when it appears from a perusal of the context or the whole statute that the legislature did not grammatically express its intention.

There is nothing in the context of this paragraph or act which to our minds indicates that the word "hyacinth" was to be used other than in its grammatical sense and as such sentences are construed by the courts, to wit, as an adjective modifying the word "clumps." On the contrary, for the reasons stated before, we think the context

and history of the paragraph indicates the intention upon the part of Congress to use the word in an adjectival sense.

We are of the opinion, therefore, that by the proper provision of paragraph 263 Congress intended to and did levy a duty of \$2.50 per thousand upon "hyacinth clumps," and that the only provision in that paragraph or the act for hyacinth bulbs is the provision for "all other bulbs."

The Government further answers this appeal by the statement that that construction should not be adopted for the reason that there is no such thing known as "hyacinth clumps."

It is conceded by all parties to the record that the particular importation is a "hyacinth bulb." It was shown clearly by the record, which is replete with all obtainable information upon the subject, that a "clump" from a horticultural standpoint is a "cluster of thickly grown plants and the roots intermingled together. It always takes two or more plants to make a cluster or clump;" and, further, quoting the testimony of another witness, it is "a mass of crowns or underground buds shooting from no common center, having several different germinating follicles in this mass."

"Bulb," as the word signifies, is defined as a germinating follicle, "emitting from its center within its flower shoots and foliage, and all from one common center."

These descriptive definitions, of which there are many in the record, are in accord with and in nowise differ from the common understanding and acceptance of those terms as applied to the subject matter.

It is shown by the record that the propagation of the hyacinth is one covering an extended period of time, and of peculiar development. Briefly stated, and there is no controversy in the record upon this point, to effect that purpose hyacinth bulbs peculiarly fitted therefor are chosen; the bulb is then scooped out or T crosses made on the exterior and bottom with a knife; it is then stored in a dry warm place until little "bulblets," so-called, are started; these little bulblets germinate upon the wounds of the bulb made by the scooping or cutting; it is maintained in a particular temperature for about three months, whereupon these little bulblets are formed; the result is then planted like an ordinary bulb, and the little bulblets grow in the mother bulb and form little sprouts, and while in the ground gradually consume the mother bulb, whereupon they are taken up to be dried and planted again, which process is repeated until they become a matured hyacinth.

Pictures were introduced showing the cluster of little bulblets on a mother bulb, and it is claimed by the importer, appellant, and was testified by the witnesses that this is what could be properly characterized as a "hyacinth clump." It is undoubtedly a cluster of roots or bulbs joined together, and within the ordinary understanding of the

word "clumps." That such clumps exist in Holland in great numbers, are interchanged among the growers there, and occasionally, though in rare instances, are imported into this country, is made clear by the record. As shown by the record, successful importation must be attended with very great care. For experimental propagation of these, the record shows, importations have been made by the Government, a plant has been established in the State of Washington, and their cultivation made a matter of governmental attention and effort.

In the light of these facts this court does not feel warranted in disturbing the grammatical construction and apparent intent of the Congress in the enactment of paragraph 263 as affecting hyacinth clumps. Indeed the act being a protective one for the purpose of not alone maintaining existing industries, but particularly for the purpose of developing new industries, these facts appear to be in perfect harmony with the purposes of the act and argue an intention of the Congress to levy a duty upon hyacinth clumps, and in furtherance of the propagation thereof a lesser duty upon the hyacinth bulb from which the clump is propagated.

Reversed.

UNITED STATES *v.* GARRAMONE (No. 636).¹

1. "CYLINDRICAL OR TUBULAR TANKS OR VESSELS" DEFINED.

It would seem "cylindrical or tubular tanks or vessels" appearing in paragraph 151, section 1, tariff act of 1909, must be taken to refer to containers made in part at least of metal and of such strong and permanent construction that on being emptied of their contents they might properly be devoted to further similar use and possessing appreciable value for such purposes.

2. VEGETABLES IMPORTED IN TIN CONTAINERS.

In view of the legislative history of the clause and its judicial interpretation, and in view of the common significance of the language employed, the cylindrical containers as described in paragraph 151, section 1, tariff act of 1909, can not be taken to remove small tin cans with contents of tomatoes and of tomato sauce from the operation of subsection 18 of section 28 of that act, though these tins are cylindrical in shape and they were dutiable ad valorem under said subsection 18.—*United States v. Marx & Rawolle* (T. D. 31210).

United States Court of Customs Appeals, May 10, 1911.

Appeal from Board of United States General Appraisers, Abstract 24821 (T. D. 31300).

[*Reversed.*]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Brown & Gerry for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise imported in this case was fresh tomatoes and tomato sauce contained in what appear to be ordinary tin cans, commonly used

¹ Reported in T. D. 31577 (20 Treas. Dec., 970).

in the transporting, holding, and preserving, until consumed, of similar and like merchandise.

As appears by the exhibits in the case, the cans are cylindrical in shape, are made without handles, rivets, or hoops, and by soldering or other treatment are apparently hermetically sealed. Upon the outside of each can appropriate lithographic pictures and advertisements on paper have been pasted or otherwise attached.

Exhibits 2 and 3 contain fresh tomatoes and Exhibits 1 and 4 contain tomato sauce. The outside dimensions of the cans we find, upon an examination thereof, to be approximately as follows: Exhibit 1, $2\frac{1}{8}$ inches high and $2\frac{1}{8}$ inches in diameter; Exhibit 4, $3\frac{3}{8}$ inches high and $2\frac{1}{8}$ inches in diameter; Exhibit 2, $4\frac{1}{4}$ inches high and $4\frac{1}{8}$ inches in diameter; Exhibit 3, $4\frac{1}{4}$ inches high and $3\frac{1}{2}$ inches in diameter.

The value of the contents of any of these cans does not appear.

The merchandise was imported from Italy, and the value of the cans by the 100 in the money of that country, as appears from the evidence, is as follows: Exhibit 1, 4.25 lire; Exhibit 2, 14 lire; Exhibit 3, 8 lire; Exhibit 4, 4.75 lire.

The contents of the cans are subject to duty at the rate of 40 per cent ad valorem. The collector included the value of the tins in the dutiable value of their contents, pursuant to the provisions of subsection 18 of section 28 of the tariff act of August 5, 1909.

The importers claimed that the value of the contents should not be so included, but that duty should be assessed thereon separately at the rate of 30 per cent ad valorem under that part of paragraph 151 of section 1 of the same act which relates to cylindrical or tubular tanks or vessels.

The board sustained the claim of the importers, from which decision the United States appealed and the case is here for review upon this question only.

We insert here so much of the act above referred to as seems necessary for the consideration of the issue raised:

151. Lap-welded, butt-welded, seamed, or jointed iron or steel tubes, pipes, flues or stays, not thinner than number sixteen wire gauge, if not less than three-eighths of an inch in diameter, one cent per pound; if less than three-eighths of an inch and not less than one-fourth of an inch in diameter, one and one-half cents per pound; if less than one-fourth of an inch in diameter, two cents per pound: *Provided*, That no tubes, pipes, flues, or stays made of charcoal iron shall pay a less rate of duty than one and one-half cents per pound; cylindrical or tubular tanks or vessels for holding gas, liquids, or other material, whether full or empty, thirty per centum ad valorem; flexible metal tubing or hose not specially provided for in this section, whether covered with wire or other material or otherwise, including any appliances or attachments affixed thereto, thirty per centum ad valorem; welded cylindrical furnaces, tubes, or flues made from plate metal and corrugated, ribbed, or otherwise reinforced against collapsing pressure, two cents per pound; all other iron or steel tubes, finished, not specially provided for in this section, thirty per centum ad valorem.

SEC. 28. That the act entitled "An act to simplify the laws in relation to the collection of the revenues," approved June tenth, eighteen hundred and ninety, as amended, be further amended to read as follows:

* * * * *

"SEC. 18. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. That the words 'value' or 'actual market value,' or 'wholesale price,' whenever used in this act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, as defined in this act."

The appellees claim that the rule expressed in said subsection 18 for the assessment of duty upon the usual coverings of merchandise subject to an ad valorem duty has no application in cases where the statute has specifically set aside a particular kind of coverings as subject to duty, that the tin cans involved in this case are cylindrical vessels within the meaning of said paragraph 151, and, therefore, are not subject to the rule referred to in said subsection 18.

The claim of the United States, in substance, is that the portion of paragraph 151 relied upon by the appellees does not include the cans involved in this case, and it refers in support of its contention to certain judicial interpretations of paragraph 152 of the tariff act of July 24, 1897, and to the history of the legislation which resulted in the enactment of said paragraph 151, which paragraph it is obvious was a reenactment, with certain changes and additions, of said paragraph 152.

This court had occasion to consider a similar question in the case of *United States v. Marx & Rawolle* (1 Ct. Cust. Appls., 152; T. D. 31210), and it is claimed by the appellees that the construction there given to the statutes involved is decisive of the issues here.

It is material, therefore, to know what was the issue there. It appears from the opinion in the case that the receptacles under consideration were certain large cylindrical iron vessels or drums fitted with a bung closed with a screw cap. Two half-round iron hoops were placed at the ends and two near the middle of these vessels to make it

possible to move them conveniently from one place to another. They were usual containers used in importing glycerin into this country, and the glycerin being subject to a specific duty, these vessels had for many years been permitted free entry.

The undisputed evidence of record in that case further shows that those drums or vessels were 43 inches in length and 30 inches in diameter, outside measurements; that after importation they were used to hold or store the glycerin until it was removed for refining or other purposes, and when emptied they were in some instances sold and in others reshipped abroad to be again returned as containers of the same merchandise in subsequent importations, which process, one witness testified, would be several times repeated. It was also testified without contradiction that an attempt had been made to import the same merchandise in wooden barrels, but that method had been abandoned because the glycerin was so heavy the barrels would not stand the strain. No sample of those containers was before us in that case, but it was conceded by importers' counsel that the drums were riveted and that the iron hoops formed an integral part of the drums, designed for facility in rolling or handling them.

We have examined and referred to the evidence in that case for the purpose of indicating clearly the character and construction of the containers there involved. It is obvious from what we have said that they were solid and substantial in their make, stronger than wooden barrels, of such durability as to enable them to withstand the wear and strain incident to repeated shipments from and to foreign countries, one way full and the other empty, and in addition so constructed that the contents could be and were removed without destruction or damage to the containers themselves.

The importers here claim that because the containers above described were by this court, in the Marx & Rawolle case, held to be dutiable under paragraph 151, it necessarily follows that the tin cans here involved, being of metal and cylindrical or tubular in shape, are vessels within the meaning of the paragraph as construed by us, and so are likewise dutiable thereunder.

In the Marx & Rawolle case it was urged upon us that if the provision of paragraph 151, under consideration, be construed in its literal sense, without regard to the language of the rest of the paragraph, all cylindrical vessels, including such articles as collar and cuff boxes and fountain pens, might be classifiable thereunder, and that if sufficient regard were had to the remainder of the paragraph to require the cylindrical vessels to be of metal, it might include not only such articles as the cans in question in this case but also tin boxes used to contain salves, ointments, and shaving soaps, and, to quote from the importers' brief in that case, "in fact every conceivable container or holder, regardless of its size or use, provided only that it is approxi-

mately cylindrical or tubular in shape," and we are now confronted with a claim which, if tenable, is about as far-reaching in its effect.

The proceedings in Congress and the matters brought to its attention which resulted in the enactment of paragraph 151 are sufficiently referred to in our opinion in the Marx & Rawolle case. It is entirely obvious therefrom that the attention of Congress was directed to certain large cylindrical and bottle-shaped metal vessels and metal tanks and reservoirs, some of them 35 feet long and 8 feet in diameter, closed at both ends and equipped with plugs, valves, and manholes, all of which had been judicially classified as tubes within the meaning of paragraph 152 of the act of 1897, which, as we have said, was the immediate predecessor of paragraph 151 of the act of 1909.

In determining the construction to be given paragraph 151 we held in the Marx & Rawolle case that in view of the judicial interpretations of paragraph 152 of the act of 1897 to which the attention of Congress had been directed and of the proceedings which took place in Congress which resulted in the enactment of paragraph 151, it was the manifest legislative intent to provide that "not only cylindrical or tubular tanks or vessels for holding gas or liquids, but also all vessels of a similar character for holding any material, and whether such vessels were full or empty," should be subject to the provisions of said paragraph. The expression "all vessels of a similar character" refers to those cylindrical or tubular tanks or vessels to which the attention of Congress had been directed, which were, as stated in the opinion, in brief, to be "certain large-sized, strongly built cylindrical or tubular metal tanks or vessels for holding gas, and possibly liquid gases," the descriptive uses of which Congress extended from that of containers of "gas or liquid gases" to "liquids or other material," and the descriptive condition of which it likewise extended so as to include them whether "full or empty."

Consistent with this interpretation of the paragraph, we decided that the glycerin drums involved in that case came fairly within the kind and description of containers intended to be made dutiable under paragraph 151.

It is manifest that there is a great difference between the containers under consideration in the Marx & Rawolle case and those here involved. As appears in that case, they were strongly built and of such strength, durability, and weight as to adequately serve the purpose of a container not only for one but also for successive importations of a substance so heavy that a wooden barrel had been found inadequate therefor.

These facts of themselves, taken in connection with the size of the drums, warrant the inference that they had a considerable value; that they were susceptible of other uses, either as containers or as holders of substances other than glycerin and might be used permanently therefor; and the fact that they were in some instances sold

instead of being used for subsequent importations would warrant the presumption that they entered into the commerce of this country in competition with similar articles manufactured here.

The articles in the case at bar are of another class altogether. It is common knowledge that in removing the contents of these tin cans one end is cut open or cut out; that when the contents are taken therefrom the cans generally serve no further or other useful purpose and become the old tin can that forms a constituent element of most rubbish heaps; that they have no appreciable, if any, value; that they do not enter into or become a part of the trade and commerce of this country or compete with like articles manufactured here; that they are bought and sold while the contents remain therein, with and as a part of the contents, and that the value of the can is not considered in such transactions of purchase and sale.

There is no evidence that the cans involved in this case are of any value after their contents are removed or that they ever become the subject of trade in any sense or that they are devoted to any useful purpose.

To hold that these tin cans are cylindrical or tubular tanks or vessels for holding gas, liquids, or other material within the meaning of paragraph 151 would be attributing to Congress a lack of ordinary sense and to the words of the paragraph a meaning which we think it was never intended should attach thereto.

We find nothing in the Marx & Rawolle case to sustain the appellees' contention here.

It might well be added that the words cylindrical or tubular tanks or vessels in common use or understanding, we think, never relate or refer to such tin cans as those involved here. Who has ever heard in common speech of such a tin can being referred to as a tubular tank or vessel? Or what purchaser, in ordering tomatoes or tomato sauce, has ever in his order referred to them as contained in cylindrical or tubular tanks or vessels, thereby meaning such tin cans as these?

While it may not be easy to state with precision the exact application to be given in future cases to the words under consideration in paragraph 151, nor is it necessary for the determination of this case so to do, yet, in view of the apparent misunderstanding as to the meaning which may be attached to the term "cylindrical or tubular tanks or vessels for holding gas, liquids, or other material, whether full or empty," it may be observed that, consistent with our decision in the case of Marx & Rawolle and of this case, it would seem that such cylindrical or tubular tanks or vessels should be made in part at least of metal, should be of so strong and permanent a construction as to be adapted for use as holders or containers after the contents first imported have been removed, should possess some appreciable value for that or other purposes, and should also be so constructed that their character and usefulness as containers would not be destroyed by the act of removing therefrom the contents first imported therein.

While, of course, the precise determination of the question must always abide the particular facts of each case, yet such would seem to be the result of construing paragraph 151 with the provisions of subsection 18 of section 28, above quoted.

As previously enacted (see section 19 of the customs administrative act of June 10, 1890) this section did not contain a provision for including in the dutiable value of ad valorem goods, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers of liquids.

In the case of *United States v. Nichols* (186 U. S., 298), the Supreme Court considered this section and held that the customs administrative act was not a tariff act; that the description of the containers therein found, which was cartons, cases, crates, boxes, sacks, and coverings of any kind, was limited to containers of solids, and intimated that the use of the words casks, barrels, hogsheads, bottles, demijohns, carboys, or words of similar signification should appear in the statute if it were sought to include in the dutiable value of liquids the containers thereof.

Congress, in enacting subsection 18, added the precise words and one other, "jars," which were embodied in the aforesaid intimation of the Supreme Court, thereby expressly indicating that so far as the containers of ad valorem goods at least are concerned there should be no distinction between the containers of liquids and the containers of solids (and it is manifest that semiliquids, which may describe the merchandise here, must fall within these two classes) and also expressly provided that—

If there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported.

The containers here, however, are the ordinary containers used for holding the merchandise transported therein. They are neither designed nor adapted to any other use nor of any value apart from their contents, and it having been found that they are not within the provisions of paragraph 151, duty is properly assessed thereon by including their value in that of their contents, as is provided in said subsection 18. They clearly are included in the words "other containers or coverings, whether holding liquids or solids," found therein. Such a conclusion gives full effect not only to paragraph 151, but also to subsection 18 under consideration.

It was evidently the intention of Congress to treat the value of the ordinary containers, at least of goods dutiable at ad valorem rates unless such containers were elsewhere so specifically provided for as to indicate a contrary intention, in the same manner as it treated the costs, charges, and expenses incident to placing the merchandise in condition, packed and ready for shipment, namely, as being included in the market value of the goods themselves in the principal markets

of the country from whence imported. It is obvious that they are bought and sold in this manner, and that all these charges, including the cost of the container, entered into their purchase price, and, therefore, for purposes of assessing duty, it is the logical and consistent way and manner to treat them.

Separated from their contents these containers are of no use, of no value, and do not constitute any part of the consideration which induces the purchase thereof by the consumers, and, ordinarily, they pass from the hands of the importers to the consumers, whose sole purpose and object is to obtain the contents and not the containers.

In addition to this, it is apparent that in the practical administration of the customs laws such a treatment of these containers contributes to rapidity and facility in the ascertainment and collection of revenue.

When containers, however, are unusual articles or forms designed for use otherwise than in the bona fide transportation of their contents to the United States, or when they are of such material use, form, shape, or value that Congress therefor or for any other reason has seen fit to apply a different rule thereto and impose additional duties thereon, clearly they are then subject to such rule and duties as are otherwise provided. That such is the scope of subsection 18 and that such is the construction to be placed thereon is plainly evidenced by the judicial interpretation which the immediate predecessor of said subsection 18 has already received in the Supreme Court. *United States v. Nichols, supra.*

The result is that the judgment of the Board of General Appraisers is *reversed*.

THOMSEN v. UNITED STATES (No. 412).¹

BASKETS OF WOOD, STAINED, DYED, OR PAINTED.

Baskets of wood, stained, dyed, or painted might be classed as baskets of wood under paragraph 214, or as manufactures of chip under paragraph 463, tariff act of 1909, but as the applicable language in paragraph 214 is the more exact and specific, it must be held to be controlling and the importation is dutiable under that paragraph.—*Brody v. United States* (2 Ct. Custs. Appls., 15; T. D. 31573); *Krauss v. United States* (2 Ct. Custs. Appls., 17; T. D. 31574).

United States Court of Customs Appeals, May 8, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23563 (T. D. 30733).

[Affirmed.]

Brown & Gerry (John Giblon Duffy and Joseph G. Kammerlohr of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief) for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

This case relates to an importation of baskets which are dutiable under the tariff act of 1909. The collector held them to be baskets

¹ Reported in T. D. 31590 (20 Treas. Dec., 1001).

of wood, stained, dyed, or painted, and therefore dutiable at 40 per cent ad valorem, under the provisions of paragraph 214. The appellants protested against this assessment, and claimed that the goods were manufactures of chip, and therefore dutiable at 35 per cent ad valorem under the provisions of paragraph 463. Several alternative claims were included within the protest, but the one just stated is the claim which appellants finally rely upon. The board overruled the protest, and the case is now submitted to this court for a review of that decision.

The facts in the case are few and undisputed. The importation consists of baskets. These are made of such wood shavings as are called chip, and they are stained, dyed, or painted.

The two paragraphs which the parties severally rely upon, are here copied in full.

214. Porch and window blinds, baskets, curtains, shades, or screens of bamboo, wood, straw, or compositions of wood, not specially provided for in this section, thirty-five per centum ad valorem; if stained, dyed, painted, printed, polished, grained, or creosoted, forty per centum ad valorem.

463. Manufactures of bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof; sponges made of rubber, forty per centum ad valorem; combs, composed wholly of horn, or composed of horn and metal, fifty per centum ad valorem.

As will be seen, the first paragraph provides for baskets of wood, making them dutiable at 40 per cent ad valorem if stained, dyed, or painted. These terms certainly cover the importation, which consists of baskets of wood, stained, dyed, or painted. The second paragraph provides for manufactures of chip and makes them dutiable at 35 per cent ad valorem. This paragraph also plainly includes the articles in question, for they are manufactures and are composed of chip. The question therefore is between the two paragraphs and requires a decision as to which is the dominant provision.

The term "baskets," being the name of the articles, seems clearly to be a more exact and specific designation of them than the term "manufactures." This latter term in this application is one of general description only. The fact that the component material is more specifically described in the second paragraph does not conflict with this conclusion, for nevertheless the term baskets is the exact and specific name of the article itself.

This principle was involved in two cases which were recently decided by this court, namely, *Brody et al. v. United States* (2 Ct. Custs. Appls., 15; T. D. 31573) and *Krauss & Co. v. United States* (2 Ct. Custs. Appls., 17; T. D. 31574). The present decision is in accord with the views expressed in the two cases just named.

The decision of the board is therefore *affirmed*.

AMERICAN EXPRESS CO. v. UNITED STATES (No. 434).¹

FEATHER BOAS UNDER TARIFF ACT OF 1897.

Boas made of feathers strung together upon cotton cords differ, of course, from the constituent parts of the boas so made, but avoiding a manifest incongruity if the law were otherwise construed, they must be taken to be like feathers in materials, quality, texture, and the use to which they may be applied, and they were properly held dutiable in similitude as feathers under section 7, tariff act of 1897.

United States Court of Customs Appeals, May 8, 1911.

APPEAL from Board of United States General Appraisers, Abstract 22845 (T. D. 30410).

[Affirmed.]

John Giblon Duffy (*Joseph G. Kammerlohr* of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

In the month of October, 1908, the appellants imported into this country a consignment of feather boas, which were made of feathers strung together upon cotton cords. These articles are used for women's wear, and under the above name are familiar to the public as well as to the trade. The collector held the importation to be dutiable at 50 per cent ad valorem under section 7, act of 1897, by similitude to manufactures of feathers. The appellants protested against this classification, and contended that the boas should be assessed at 20 per cent ad valorem as manufactured articles not enumerated in the law, and therefore falling within the appropriate provision of section 6 of the act. The protest was duly heard upon evidence by the board, and the ruling of the collector was sustained. The appellants now pray for a reversal of the board's decision.

The facts in the case are few and undisputed. The boa in question is composed entirely of feathers and a cotton cord, by means of which the feathers are tied into a strand; the cord itself is of relatively insignificant value and serves no other purpose than that already stated. The only issue in the case is as to the correct classification of such an article under the tariff law of 1897.

There are three parts of that act which are referred to in discussing this issue. They are paragraph 425, and sections 6 and 7. They separately read as follows:

425. Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this act, fifteen per centum ad valorem;

¹ Reported in T. D. 31591 (20 Treas. Dec., 1003).

when dressed, colored, or otherwise advanced or manufactured in any manner, including quilts of down and other manufactures of down, and also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem.

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

SEC. 7. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this act, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

It will be observed that paragraph 425 provides for a duty of 50 per cent ad valorem upon feathers of all kinds when dressed, colored, or otherwise advanced or manufactured in any manner. This provision, however, if taken alone would not include the importations at bar, because they are no longer feathers, nor are they manufactures of feathers only; but they are rather manufactures composed of two separate constituent materials. Such a manufacture as this, formed by the combination of feathers and cord, where both materials form essential and substantial parts of the manufactured article, is no longer feathers or cord, nor is it properly a manufacture of either. These articles therefore do not come directly within the enumerations of paragraph 425.

The contention of the appellants is that this fact places the articles within the provisions of section 6 as unenumerated manufactures dutiable at only 20 per cent ad valorem. On the other hand, the Government contends that section 7 controls and that the articles are dutiable at 50 per cent ad valorem either under the similitude clause in that section or under the clause therein governing manufactures composed of two or more materials.

If the interpretation maintained by the appellants should prevail, it would confessedly produce a very anomalous result. For in such case dressed and improved feathers imported as such would be dutiable at 50 per cent ad valorem, whereas similar feathers joined

together without other change in their condition and either with or without the addition of other materials of lesser value would be dutiable at only 20 per cent ad valorem. And this would be the case even though the feathers thus united nevertheless maintained otherwise their several forms and conditions as feathers and could again be separated into individual feathers without injury to their structure. In other words, such dressed feathers if imported in mass would be dutiable at 50 per cent ad valorem, but if tied together with a thread so as to be useful or ornamental together, but still capable of separation, they would be dutiable at only 20 per cent ad valorem. Such provisions appearing within the same statute would be incongruous and unreasonable, and the result would be inconsistent with the tenor and purposes of the act. The court is not entitled to legislate new terms into the law in order to prevent such a result, but on the other hand such an interpretation should be adopted as will avoid a manifestly unintended result, if it can be done without violence to the language of the enactment.

Turning then to section 7, above quoted, two provisions are found which bear upon the question. The first is the similitude clause, which provides that every imported article not enumerated in the act, which is similar either in material, quality, texture, or the use to which it may be applied to any article therein enumerated as chargeable with duty, shall pay the same rate of duty which is levied upon the enumerated article which it most resembles in any of the particulars before mentioned. Now, these boas, while constituting a new article composed of feathers and string, are yet similar in material and quality to feathers, or to a manufacture of feathers, for the feathers so predominate in their construction, appearance, and use, that the manufacture does not change the feathers, but simply collects and applies them as such. The string by which the feathers are united serves a purpose similar to that of an outside wrapper which would hold separated feathers in bulk. An inspection of the exhibit discloses the fact that the string itself is so covered by the feathers as to be quite invisible. It does not change the character of the feathers, and its use is so subordinate to theirs that the combined product, while no longer feathers alone, may yet properly be held to be similar to feathers in materials, quality, texture, and the use to which it may be applied. The articles would also of course be similar to a manufacture of feathers. The similitude clause does not require exact identity between the related articles; such identity indeed would make that clause inapplicable. The clause applies only where there are differences between the articles, and yet also such points of identity as to make them like one another in some of the particulars named by the statute.

The second provision of section 7, which has been above referred to, provides that on unenumerated articles manufactured of two or more materials the duty shall be assessed at the highest rate at which the same would be chargeable if wholly composed of the component material thereof of chief value. These articles were concededly not specifically enumerated in the act, and they are composed of two materials, of which feathers are the more valuable. Therefore, according to the provision last above cited, they were dutiable at the same rate as if manufactured wholly of feathers. That is to say, they should be assessed as if they were manufactures of feathers. Now it is true that the term "manufactures of feathers" does not appear in those words in the act. However, paragraph 425 enumerates feathers of all kinds "when dressed, colored, or otherwise advanced, or manufactured in any manner." It is argued by appellants that these terms refer only to such means and results as improve the feathers themselves, and that manufactured feathers are simply feathers finished in quality by treatment. But while this meaning is certainly contained within the term, nevertheless it is not the only meaning which may fairly be given it. Feathers of all kinds, when dressed or colored, or when otherwise—that is, by processes additional to dressing or coloring—they are advanced or manufactured in any manner, are included within this classification, and it is obviously designed to be a very comprehensive one. The broad provision for all processes whereby the feathers may be advanced or manufactured in any manner may well include the simple process of threading the feathers upon a string. This construction does no violence to the language of the provision and makes it consistent with the other provisions of the law which are within the same subject matter.

By adopting this interpretation, dressed and finished feathers would be dutiable at 50 per cent ad valorem; such feathers if united for use without the addition of any other material would bear the same rate. If they were combined with other materials in the manufacture of a new article, such article, unless specifically enumerated, would be dutiable at the rate chargeable to a manufacture composed wholly of the component material of chief value. It should be remembered that these statements all apply to the act of 1897.

The Berlinger case, cited by appellants, does not conflict with this conclusion. In that case the articles were manufactured of feathers, wire, cotton, and buckram, and therefore could not be called manufactures of any of the component materials alone. They were therefore classified under paragraph 193 as manufactures in part of metal, not otherwise provided for. That decision, when limited to the actual issue involved, does not necessarily imply that there was no provision in the act for manufactures of feathers, any more than that

there was no provision for manufactures of metal, cotton, or buckram. The articles in that case, because of their composition, could not fall within any such single classification; and the court was therefore not required to pass upon any issue involved in the present case.

The decision of the board is *affirmed*.

LOEWENTHAL *v.* UNITED STATES (No. 499). SUNDHEIMER *v.* UNITED STATES (No. 500).¹

NARROW SILK FABRICS SHOWING ORIGINAL DESIGNS.

Trimmings were provided for *eo nomine*, in paragraph 390, tariff act of 1897. The testimony shows that silk fabrics such as those imported, $\frac{1}{2}$ to $1\frac{1}{2}$ inches in width, with original designs thereon, are known commercially as trimmings; and they fell within the *eo nomine* description, although the term is a comprehensive one and may include articles that are sometimes designated by a name more restricted in meaning. The importation was dutiable under paragraph 390, tariff act of 1897.—*Sidenberg v. Robertson* (41 Fed. Rep., 763); *Naday v. United States* (164 Fed. Rep., 44).

United States Court of Customs Appeals, May 8, 1911.

APPEAL from the United States Circuit Court for Southern District of New York,
G. A. 6909 (T. D. 29761).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The two cases were heard together, and involve merchandise which consists of narrow woven silk fabrics from half an inch to $1\frac{1}{2}$ inches in width showing original designs in various colors and patterns. They were assessed for duty at the rate of 60 per cent ad valorem under paragraph 390 of the act of 1897. They are claimed to be dutiable at the rate of 50 per cent ad valorem under paragraph 391 of the same act.

The material portions of the paragraphs in question are as follows:

390. Laces, and articles made wholly or in part of lace, edgings, insertings, galloons, chiffon or other flouncings, nets or nettings and veilings, neck ruffings, ruchings, braids, fringes, trimmings, embroideries and articles embroidered by hand or machinery, or tamboured or appliqued, clothing ready made, and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all of the above-named articles made of silk, or of which silk is the component material of chief value, not specially pro-

¹ Reported in T. D. 31592 (20 Treas. Dec., 1007).

vided for in this act, and silk goods ornamented with beads or spangles, of whatever material composed, sixty per centum ad valorem. * * *

391. All manufactures of silk, or of which silk is the component material of chief value, * * * not specially provided for in this act, * * * fifty per centum ad valorem.

The Board of General Appraisers held the articles to be properly dutiable as trimmings under paragraph 390. The importers appealed to the United States Circuit Court, Southern District of New York, where the decision of the board was affirmed. From that affirmation the importers now appeal to this court.

A similar case arose in 1902 and 1903 involving narrow ornamental silk fabrics, and was considered by the Circuit Court in *Naday & Fleischer v. United States* (155 Fed. Rep., 303), and again, on appeal, by the Circuit Court of Appeals of the Second Circuit, and is reported under the title of *Naday & Fleischer v. United States* (164 Fed Rep., 44). In these two decisions the importation was held dutiable under paragraph 390. The Board of General Appraisers expressly found as a fact that the goods in this case did not differ from those in the *Naday & Fleischer* case, and this finding was affirmed by the Circuit Court.

The question there adjudicated is renewed in this case, and it is sought to differentiate the present case from that in this: The contention is made that the word "trimmings" had come to have, prior to the enactment of the statute in 1897, a narrow meaning which limits its application to merchandise which is made up into trimmings by the seller from such articles as those imported in these cases, and does not include articles which are used as trimmings. A careful examination of the record in the case has satisfied us that the finding of the Board of General Appraisers is not only justified but is supported by an overwhelming weight of the testimony.

The witnesses for the importer testify that the word "trimmings" describes the goods in question. As an illustration, the witness Max Sundheimer, one of the importers, testifies, in answer to the questions:

Q. And, as far as you know, goods of this class that we have before us have always been considered by the trade as trimmings?—A. No; a great many call them ribbons. [The question was ordered re-read.]—A. By trimming buyers; yes.

In another place he testifies:

Q. * * * I want to know what are the goods that you referred to when you said you were a dealer in trimmings?—A. Anything a woman can use in trimming.

Q. Such goods as we have here?—A. That is one of a few articles; yes, sir.

* * * * *

Q. Is the word "trimmings" a commercial word that is understood by the trade?—A. "Trimmings" is such a general article. Groceries. If a man goes in a grocery store it is some certain thing he wants.

Q. Do you know whether the trade understands what is meant by the word "trimmings"?—A. A trimming is a great quantity of articles.

Without quoting from other witnesses, it is enough to say that the effort to show that "trimmings" is not a commercial term evidently rested upon the idea that articles which are in fact trimmings and are known to the trade as such consist of a variety of articles which may be given a name in the trade more specific, and which nevertheless fall under the trade designation of trimmings. It is not claimed in this case that section 391 described *eo nomine* the importations in question. We think a very good statement of the law is contained in the charge of Lacombe, Judge, in *Sidenberg v. Robertson* (41 Fed. Rep., 763), from which we quote:

The plaintiff has to cover with his trade evidence both descriptions of words—the words under which the laces are actually bought and sold, and also the word or words under which he claims that they are not known. Of course, if the particular word or phrase by which they were bought and sold were one of the phrases or words in the tariff act, as soon as he had proved that the articles were bought and sold, and known in commerce by that word or phrase, he would have proved his whole case. But where the particular word, the trade meaning of which he proves is not in the tariff act, and that instrument contains only general words, he must go further, and prove not merely that the articles are bought by one particular trade name, but that the general words used in the tariff act, which otherwise would cover them, do not cover them in trade and commerce.

Applying this language to the present case, it is incumbent upon the importers to show that although these importations may in some instances be known as ribbons or other specific name, yet if they are in fact also known to the trade as trimmings, the importer has failed to make his case. See also *In re Herrman* (56 Fed. Rep., 477); *Drew v. Grinnell* (115 U. S., 477); and *In re McGibbon*, G. A. 6147 (T. D. 26692).

We do not overlook the contention of the importers' counsel that the word "trimmings" is used by dealers as a descriptive term rather than as a trade term. But it is a sufficient answer to say that we are convinced from the testimony that in the sense in which a broad trade term may be given effect, this term is shown to be one used in the trade within the meaning of the cases above cited. Nor can we accept the view of the importers that the word "trimmings" has been given a restricted meaning in the trade which excludes the articles in question here.

We do not know of any reason for departing from the rule laid down in the *Naday & Fleischer* case or for overturning the finding of fact by the Board of Appraisers and by the Circuit Court in this case, and it follows that the decision of the Circuit Court should be *affirmed*.

STONE *v.* UNITED STATES (No. 516). KRAEMER *v.* UNITED STATES
(No. 527).¹

1. "SADDLERY."

In view of the construction by the administrative departments, by the board, and by the courts, and in the absence of clear proof of a commercial designation, the word "saddlery" occurring in paragraphs 450 and 461, tariff act of 1909, can not be taken to apply to articles used in the care of horses or for horse-stable equipment.

2. CURRYCOMBS, HOOF PICKS, HORSE CLIPPERS, WHIP THONGS, AND THE LIKE.

Currycombs, hoof picks, horse clippers, whip thongs, and the like are not "saddlery," and these are dutiable according to the component of chief value as manufactures of metal or the manufactures of leather.

3. TIME PROVISIO IN PARAGRAPH 450, TARIFF ACT OF 1909.

The qualifying words of one clause of a section may be extended to other clauses or even other sections of a law, if to give effect to the apparent intent of the legislature this is necessary; and the proviso in paragraph 450, tariff act of 1909, that on and after October 1 of that year certain described leather goods should bear a prescribed rate of duty, will be taken to apply to all the articles enumerated in the several clauses of that proviso and to similar articles also designated in paragraph 461 of the act.

United States Court of Customs Appeals, May 8, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24331 (T. D. 31134).

[Affirmed.]

Brown & Gerry for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importations the subjects of controversy in these two cases are, as to the first-entitled cause, currycombs, hoof picks, rack chains with two snaps, a swivel, and a ring, horse clippers, and parts of horse clippers. As to the second-entitled cause, whip thongs, lip straps, bridle fronts, pony bridles, and leather-covered buckles.

The above-described importations of Stone & Co. and Bartley Bros. & Hall, which were the subject of protest in the first-entitled cause were classified as "manufactures of metal and manufactures of leather, and dutiable, respectively, at the rate of 45 per cent under paragraph 199 of the tariff act of 1909 and at the rate of 40 per cent under paragraph 452.

The importation of whip thongs protested in the second entitled cause was classified as manufactures of leather, dutiable at the rate of 40 per cent under paragraph 452. A further question raised in the second above-entitled cause will be dealt with later.

¹ Reported in T. D. 31593 (20 Treas. Dec., 1010).

The principal question presented in the two cases is whether the word "saddlery" is broad enough, either in its ordinary signification or by any extended use established by evidence of commercial designation, to include such articles as currycombs, hoof picks, horse clippers, rack chains, and whip thongs, the articles involved in this importation.

Turning to the lexicographers we find the word "saddlery" defined by the Standard Dictionary as "saddles and whatever belongs to them collectively; all leather articles and their fittings used about horse furniture." The Century Dictionary defines "saddlery" as "saddles and their appurtenances in general; hence by extension, all articles concerned with the *equipment* of horses and especially those made of leather, with their necessary metal fittings." In Worcester the term "saddlery" is defined as "saddles and other articles of horse gear made by a saddler."

It is clear that such articles as are used in the care of horses and as stable equipment do not fall within these definitions. The definition is not broad enough to include everything that may be used in the care of a horse. For instance, in *Veil v. United States* (113 Fed. Rep., 856), it was said by Coxe, district judge:

I do not think it can be contended that "saddlery" is limited to articles of leather, because it appears that there is a saddle cloth and I suppose the court may take judicial notice that the surcingle is made of canvas. On the other hand, I think the word "saddlery" should not be expanded to apply to these articles in suit, which belong more properly to the veterinary department. "Saddlery," whatever else it may or may not mean, ought to be applied to the trappings of a well horse, a "going" horse, and not a sick one.

See also *McCoy v. Hedden* (38 Fed. Rep., 89, and T. D. 21713), which contains a definition of the word "saddlery" quite in harmony with that given by the lexicographers, which we think is fairly comprehensive:

The term "saddlery" would seem to embrace most, if not all, articles used in the equipment of horses. It might be defined as the apparel of a horse, and would include halter, bridle, saddle, girth, crupper, etc., just as the apparel of a person would include hat, shirt, suspenders, trousers, shoes, etc., * * *."

It appears also that administrative construction is in accord with this definition. For instance, "horse shears" were classified under the provisions of "cutlery of all kinds" (T. D. 3195), while on the other hand "saddle girths" have been held dutiable as saddlery, because "essential parts of saddles and intended exclusively for use as such." (T. D. 5776.) And the practice of customhouses, as shown by customs examiners, has been to return for duty articles that are used in parts of harness or as saddles as saddlery; also, saddle girths and rollers as saddlery, but currycombs, hoof picks, manger locks, and clippers have been returned according to the component

material of chief value; and articles which are used in the care of a horse, as distinguished from the equipment of a horse, have not been classified as saddlery.

In view of this construction by the administrative department and by the board and the courts, it is to be presumed, in the absence of very clear proof of a commercial designation, that the word "saddlery" was used in its ordinary signification by Congress in the enactment of the present statute. This is manifest by the comprehensive language used in the words "harness, saddles, and saddlery." Under the rule of *ejusdem generis* the inference is strong that there was intended to be included in this classification articles which were the gear or equipment of a horse.

The question is raised as to whether a commercial designation should prevail over such evidence of legislative intent as is afforded by this history of previous legislation and the construction thereof. Upon this subject see *Roosevelt v. Maxwell* (20 Fed. Cas., 1155).

But we deem it unnecessary at this time to determine this question. We are convinced that there has been shown no such clear, uniform, and precise use of the term "saddlery" in the wholesale trade as to justify us in discarding the ordinary definition of the word and adopt one so comprehensive as to include articles which have never been heretofore known in common parlance under that name.

The attempt to show this commercial usage was by three witnesses who are engaged in the business of selling goods. One witness testified, in answer to the question—

Q. Is the term saddlery one that is generally recognized in your trade?—A. Yes, sir.

Q. What variation, if any, have you found in the meaning of the word as used by you?—A. Simply goods for the use and care of horses. Some use the words "horse goods," but the term generally known is "saddlery goods."

* * * * *

Q. Do you as a salesman actually make use of the word "saddlery"?—A. Why, oftentimes; yes, sir.

Q. And you hold yourself out as a dealer in saddlery?—A. Yes, sir. In the trade that is a recognized term, a word that is used—saddlery and horse goods. Sometimes we say "saddlery and horse goods," and sometimes use the word "saddlery."

It is evident that this language is used rather with the purpose of defining the vocation of the salesman than as any attempt to define technically the character of the goods which he is offering for sale. It is well known that salesmen of drugs oftentimes sell in connection such articles as cigars and cigarettes, yet they would ordinarily speak of themselves as drug salesmen, and of their business as druggists. It would hardly do to say that this would show conclusively that cigars or cigarettes are drugs. The testimony of the other witnesses is of similar character, and we agree with the Board of General Appraisers that it is not persuasive to show that the term saddlery is synonymous with horse goods.

The question is not wholly dissimilar to that of *Davies et al. v. United States* (107 Fed. Rep., 266), in which case it was claimed that carriage whips were dutiable as saddlery and the evidence showed that they were sold in saddlery shops. If the testimony of the importer's witnesses is analyzed, it will be seen that this is substantially the only reason for saying that these importations are saddlery. They are carried in the stock of saddlers, and there is nothing to indicate that they are not also carried by hardware men. This would not make them saddlery in one case and hardware in the other. The board did not err in its ruling on this branch of the case.

The other question presented in the brief of counsel as to the second case is that dependent upon the construction of the proviso to paragraph 450. The pertinent provisions of the statute are as follows:

PAR. 450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, grain, buff, and split leather shall pay a duty of seven and one-half per centum ad valorem; that all boots and shoes made wholly or in chief value of leather made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species, including calfskins, shall pay a duty of ten per centum ad valorem; that harness, saddles and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of twenty per centum ad valorem.

PAR. 461. Harness, saddles, saddlery, in sets or in parts, finished or unfinished, thirty-five per centum ad valorem.

The importer contends that the provisos to paragraph 460 as to time is to be restricted to the first clause of the proviso. If this construction be placed upon the language, it renders paragraph 461, which fixes a duty of 35 per cent ad valorem on harness, saddles, saddlery, accessories and parts, finished or unfinished, inharmonious, as its language clearly includes many articles which would by protestant's construction fall under the leather paragraph. According to the construction of the importer, this same provision in paragraph 450 that harness, saddles, saddlery, accessories and parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of 20 per cent ad valorem, places a restriction upon harness, saddles, and saddlery composed wholly or in chief value of leather. This classification would include almost all property which would otherwise fall under paragraph 461. But aside from this we think the language is perfectly plain. In the absence of language speaking to the future in the various paragraphs of section 1 the bare statement of the rate of duty is all that occurs, and it relates back to the first part of the section where it is declared—

That on and after the day following the passage of this act, except as otherwise specially provided for in the second section of this act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions * * * the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed, namely:

In paragraph 450 the proviso is intended to take effect in the future. It is provided that on and after October 1, "seven and one-half per centum ad valorem;" and following further is the proviso that "harness, saddles, saddlery in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, *shall* pay a duty of twenty per centum ad valorem." These words "shall pay a duty of" were obviously introduced for the purpose of making the enactment speak as of a future date and relate back to the words "on and after October 1, 1909."

It is hardly necessary to cite authority to support what seems to us a very obvious construction of this statute, but the authorities cited in the brief of counsel for Government are ample to justify the statement that the court will look to the entire clause or section and will apply the words as the evident intent of the legislature is manifested and that qualifying words of one clause of a section may be extended to other clauses or even to other sections if such be the apparent intent of the legislative body. Endlich on Interpretation of Statutes (secs. 404, 414); Lewis's Sutherland Stat. Cons. (secs. 409, 420, 421). The language of the court in *The Harriet* (11 Fed. Cas., 588), opinion by Mr. Justice Story, is peculiarly appropriate:

If, then, a clause is found in one section which, in its general language and import, is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found; if the main objects of those sections and the true intent and policy of the act will be best promoted by reading it as applicable to all those sections; and if public mischiefs equally within the scope of the statute would be thereby prevented, and upon a different construction those mischiefs would be left without redress, there certainly is very strong ground to say that the clause ought to be so construed as to suppress the mischiefs and not promote or protect them; that, as its language is appropriate, so it shall be construed as intended to include them.

The purpose of this proviso is not difficult to see. Section 450 had the purpose of admitting hides of cattle free of duty, and also of reducing the tariff rate on leather and manufactures thereof. But in view of the fact that the importations of manufactures of leather would, if admitted at the reduced rate, at once, upon taking effect of the statute, bring such importations in competition with importations already made or with domestic manufactures which had been produced at a time when the tariff rate was much higher, it was thought best to give to the manufacturer the opportunity to market his goods before this substantial reduction should be effective. Obviously this consideration applied as well to the manufactures of leather, such as those under consideration in this case, as to any others named in the proviso.

We think the Board of General Appraisers did not err upon this branch of the case. It follows that the decision of the board in each of these cases is *affirmed*.

SHELDON v. UNITED STATES (No. 518). HEMPSTEAD v. UNITED STATES (No. 519).¹

1. COURT OF CUSTOMS APPEALS—POWERS TO REVIEW.

The act creating this court empowers it to review not alone the law, but, when the findings of the Board of General Appraisers are made an issue, to review the facts presented upon appeal to this court.

2. A RECORD USED AS A BASIS FOR OPINION BELOW SHOULD BE INCORPORATED HERE.

To enable this court fairly to review a finding of fact by the board, when this finding is made an issue on appeal, it is essential that the court should have before it all the testimony that influenced the board in reaching its conclusion.

3. SAME.

This is not to say the board may not, in the course of its oftentimes necessarily summary determinations, rely in its findings on proof in other like cases, heard on earlier dates by the board.

United States Court of Customs Appeals, May 8, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24047 (T. D. 30983).

[Reversed.]

Curie, Smith & Maxwell (*W. Wickham Smith* and *Thos. M. Lane* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*T. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The chief and we think controlling contention in these cases is a matter of procedure. The cases arose at the port of Chicago, were duly noticed for hearing before a general appraiser sitting at that port, and testimony on behalf of the importers introduced. The record was returned to the port of New York, and in due course decision rendered.

The decision of the board is as follows:

The merchandise consists of a thick paper of the variety known as "millboard" or "binders' board." The collector assessed duty on the said paper board at the rate of 35 per cent ad valorem under the provisions of paragraph 415, tariff act of 1909, as "cardboard." It is claimed that the merchandise is dutiable properly at 30 per cent ad valorem under paragraph 415, as "paper" not specially provided for.

The proof offered in these cases does not warrant a departure from the ruling of the board as laid down in G. A. 7078 (T. D. 30826), and for the reasons stated in that decision these protests are overruled. The assessments in question are affirmed.

It is urgently contended by counsel for the importers, as shown by the decision, that the findings of the board were controlled by its

¹ Reported in T. D. 31594 (20 Treas. Dec., 1015).

findings in another case, G. A. 7078 (T. D. 30826), and of necessity the evidence supporting the same.

The testimony in that case is not made a part of the return in this case, nor was it upon motion of either party or order of the general appraiser made a part of the record.

The Assistant Attorney General in his brief, and in support of his contentions, cites as to the necessity and propriety of the practice followed by the board, and in support of its findings, excerpts from an opinion written by Judge Somerville in G. A. 5437 (T. D. 24715), as follows:

In this case a request has been made by the counsel for the Government that the testimony taken by the board in the Leerburger case above cited be introduced as evidence in this case, which request is granted in accordance with a well-settled practice of the board. Suits to recover back duties alleged to have been illegally exacted usually involve, as one of the necessary issues, the proper classification of imported merchandise, so that, in a certain sense, such suits are proceedings *de re*, rather than *inter partes*. In this view of the matter, the board has found it expedient and conducive to justice to allow, on the motion of either party, the introduction of evidence taken in other cases whenever it has been shown that the merchandise in question was of the same kind. It is not unusual for the board to take the testimony of 20 or 30 witnesses as to the character and uses of merchandise; and if this testimony could not be applied, in the discretion of the board, to other like goods embraced in different importations, great embarrassment and delay might ensue. It could scarcely have been the intention of Congress to oblige the board to take such voluminous evidence *de novo* in every case arising before it, similar cases often running into the thousands. One of the objects of the customs administrative act was to simplify the collection of the revenue and afford importers a speedy determination of controversies relating to it, and to produce uniform classification of imports. Section 15 of said act has, therefore, carefully provided that "all the evidence taken by and before said appraisers shall be competent evidence" on appeal to the Circuit Court. The decisions of the courts have also established the soundness of the board's practice in this respect. In Klipstein's case on zinc dust, G. A. 4744 (T. D. 22415), the board expressly based its finding in part on the evidence taken in a former case, and its decision was affirmed by both the Circuit Court and Circuit Court of Appeals; and on more than one occasion judges have openly declared that they were guided to some extent in deciding customs cases before them by their knowledge of testimony taken in other cases. *Field v. United States* (90 Fed. Rep., 412, 33 C. C. A., 138, 139); *Sullivan v. Robertson* (37 Fed. Rep., 778, 779).

This statement by Judge Somerville, which very succinctly and clearly justifies the procedure upon behalf of the Board of General Appraisers therein considered, is not precisely applicable to these cases on appeal to this court.

Any knowledge of the enormous number of protests necessary of decision by the Board of General Appraisers and the character of those protests certainly warrants the summary procedure adopted by the board. Without it their already onerous labors would not only be greatly multiplied, but would be beyond the possibility of performance by any similar number of officials.

The statutory requirements defining the duties of this court, however, when taken into consideration with the condition surrounding the procedure in these cases, does not enable this court from this record to perform those duties incumbent upon it by the law. By the organic act creating this court we are to review not alone the law but the facts presented upon appeal here when the findings of the board are made an issue.

In this case, as shown by the decision of the board, they reached their conclusion upon authority of G. A. 7078 (T. D. 30826). This resulted, as indicated by the board in its decision, that though the testimony introduced in this record might tend to establish a conclusion contrary to that reached by the board in the previous case, nevertheless, the board did not consider this testimony sufficient to outweigh its findings in another case, which findings were, of course, reached by virtue of the testimony in the other case. The very course of the board indicates, as is shown by this record, that the testimony in this record might prompt upon behalf of the board itself another conclusion than that reached by it, were it not strengthened by testimony in the other case which it had previously heard, considered, and decided.

In order to enable this court, however, to review that finding of fact by the board which is made an issue upon this appeal it is essential that the court should have before it all the testimony which influenced the board's conclusion and ultimate finding of fact before this court can fairly or justly review that finding. That testimony is not a part of this record, and so far as this record speaks there is before us that testimony alone which the board in its opinion indicates is contrary to its conclusion, and which it, therefore, impliedly finds sustains a contrary finding. That being the only testimony in the case before this court we must measure the findings of the board by the testimony before us, which under the circumstances of this record can lead to no other possible conclusion than that they are unsupported by the evidence in the record.

It is obvious that if this court holds presumptively true and conclusive a finding of the Board of General Appraisers which is supported merely by citation of other findings in another case that such practice would not be a review by this court of all the testimony supporting the board's conclusion, but would be accepting and making final by this court a prior decision of the Board of General Appraisers from which no appeal had ever been taken and the testimony supporting which is not before the court.

This brings us to a consideration of the cases cited in the opinion of Judge Somerville. It is stated in G. A. 4744 (T. D. 22415), the United States Circuit Court for the Southern District of New York and

the United States Circuit Court of Appeals for the Second Circuit approved that course upon the part of the board. What the courts did in that case is shown by the decision of Judge Somerville not to have been done in this case. In that case it is stated in the opinion of Judge Somerville, in G. A. 4744 (T. D. 22415), as follows:

We may add that in the trial of these cases all the testimony admitted in the Circuit Court or Circuit Court of Appeals in the Roessler case, *supra*, was received by the board as evidence, and some additional testimony was taken, both by the Government and the importers.

So that there was in that case the whole record upon which the board's previous decision was rendered for review by the Circuit Court and Circuit Court of Appeals. As to advertance by the court in the other cases cited by the learned judge, they were cases which had come under observation of the appellate court itself, had been reviewed by it, and were, therefore, decisions in which the records themselves were before that court for examination in conjunction with the decision rendered therein as explanatory thereof should the court so desire. But in these cases there is not before this court the testimony which controlled the Board of General Appraisers in its decision.

The board in the course of its experiences in the trial of these numerous cases has recognized the serious character of this situation, and by Rule XXXIV, which it was expressly empowered to enact by Congress, they put in concrete form a method of procedure which would seem to apply fairly and justly to all parties concerned and meet the requirements of the situation. That rule, in a word, provides that records in previous cases can upon motion of either party or the general appraiser be made a part of the record, but that there shall be the right of cross-examination of the witnesses. Such a rule makes for the early determination of customs cases, and affords all parties concerned a fair opportunity to be heard.

Whilst we are not here deciding that the board may not rely upon its findings in other cases in the course of its necessarily summary determinations, the very organic act of this court compels us to the conclusion that, when a review of the finding of facts is here invoked, this court is unable to do so unless at least there is incorporated within the return of the board, and made a part of the record in this court, all the testimony and evidence considered and given any weight by the board in making that finding.

Under the circumstances we have no other recourse than to reverse the cases and remand them for a new trial. Accordingly the decision of the board is *reversed*, and so remanded.

GERMANIA IMPORTING CO. v. UNITED STATES (No. 520).¹

1. THE MAKING OF PAPER.

To constitute a material paper, it is not necessary that the machine used in its manufacture should be known as a paper-making machine, nor that the material should contain glue, alum, and clay; the product determines its classification.

2. WRAPPING PAPER.

Material having the ordinary thickness of wrapping paper, with the appearance of wrapping paper and used as such, must be deemed not wood pulp but wrapping paper, and was dutiable under paragraph 402, tariff act of 1897, as paper not specially provided for.

United States Court of Customs Appeals, May 8, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24059 (T. D. 30991).

[Affirmed.]

John Giblon Duffy (*Joseph G. Kammerlohr* of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in issue in this case was invoiced as "pack cellulose." Cellulose in the German language means wood pulp. It was classified under paragraph 402 of the act of July 24, 1897, as paper not specially provided for at 25 per cent ad valorem, and is claimed by appellants to be unbleached chemical wood pulp and dutiable under paragraph 393 of the same act at one-sixth of 1 cent per pound.

The sole question in the case is whether the article is paper or wood pulp. The material is of the ordinary thickness of wrapping paper, and presents a perfectly smooth surface on one side and has the appearance of wrapping paper. The evidence shows that it is used as such.

In Wagner's Chemical Technology paper is defined to be—

A thin felt of vegetable fibers, mechanically and chemically clarified, crushed, and torn into a pulp suspended in water. This pulp is spread equally in thin layers, drained, pressed, and dried into the compact substance we call paper.

This article would appear to answer this description. The testimony of numerous witnesses on behalf of the Government shows that the article is known as paper and sold as paper. The evidence on the part of the importer does not materially differ from that of the Government's witnesses, but the strength of the importer rests in the claim that this can not be called paper, first, because it is not made in a paper-making machine, and, secondly, because it does not

¹ Reported in T. D. 31505 (20 Treas. Dec., 1019).

contain glue, alum, and clay. A number of witnesses, however, were called by the Government who testified that the presence of these ingredients is not necessary, and indeed it would seem to be demonstrated by this sample that their presence is not necessary to make paper. The sample itself is enough to demonstrate that it answers all known definitions of paper as understood by the average person. The sample is firm, well adapted to the purpose of wrapping paper, and we have no doubt that it was so handled and sold by the importers.

George Staber, a member of the importing company, testified:

Q. In the course of the last two years have you ever had any customers come in and ask you for any samples of wrapping paper?—A. Yes; I suppose it happens every day.

Q. Did you ever show them this article along with other samples?—A. I show them a lot of things.

Q. Have you ever when they asked for wrapping paper showed them this material along with others?—A. No; I don't know; I can't say I have.

Q. You probably have, haven't you?—A. Maybe.

The witness, Hans Bayer, who was the manufacturer of this paper, was asked on cross-examination:

Q. Do you know by what process the smooth, shiny surface on one side of the merchandise is produced?—A. Yes; by a dry cylinder with very smooth surface.

Q. If so, describe the process.—A. When damp cellulose material is pressed onto the polished surface of the dry cylinder for the purpose of drying, the one side becomes smooth, the other side remaining rough.

Q. What is the purpose of giving the merchandise this smooth surface?—A. Because it pleases the eye.

* * * * *

Q. For what use is this imported merchandise made?—A. This produce having not yet undergone an improving process, can therefore be used in the manufacture of paper and as wrapping paper.

The ordinary dry commercial wood pulp is made by a machine similar to that which produces this except that both cylinders are felted, the purpose being to eliminate the water from the material in order to save freight in shipping. Obviously, the thicker the product can be left and this object obtained the greater the economy in production. The practice as to this material, however, is quite different. It is given a smooth surface on one side, is pressed to a thickness which makes it available for use as paper, and it is obvious that except in rare cases it would not be used for any other purpose than as paper, and the testimony convinces us of this fact.

But it is said that this is not paper, for the reason that it is not made in a paper-making machine. Originally paper was made by hand process. That some particular machine may make paper by a somewhat different process does not demonstrate that the product now before us for consideration is not paper.

In answer to an interrogatory directed to the same witness, Hans Bayer: "Is said machine, upon which said merchandise was made, a paper-making machine?" he replied:

This interrogation I can not answer, but according to my directions pack cellulose should be manufactured on a cellulose-drying machine, which is quite similar to a paper-making machine.

We think this testimony is stating the fact with moderation, and that it is so similar in fact that the product which it produces is in fact paper.

The decision of the Board of General Appraisers so classifying this product is *affirmed*.

UNITED STATES *v.* BRAUN CHEMICAL CO. (No. 561).¹

CYLINDRICAL IRON DRUMS CONTAINING CHEMICAL SALTS. •

Where the containers are cylindrical iron drums that it is necessary to cut into two parts in order to remove their contents, and when so cut in two appear to have no value and do not enter into or become a part of the merchandise of this country for any purpose whatever, they are not dutiable under paragraph 151, tariff act of 1909, as cylindrical or tubular tanks or vessels for containing purposes and separately from their contents, but rather as usual containers possessing no value apart from their contents, and their value should be assessed along with the contained merchandise at ad valorem rates under paragraph 3, pursuant to the provisions of subsection 18, section 28, tariff act of 1909.—United States *v.* Marx & Rawolle (T. D. 31210) distinguished.

United States Court of Customs Appeals, May 10, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24523 (T. D. 31182).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*William A. Robertson* on the brief); for the United States.

No appearance for the appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise imported in this case was chloride of magnesium, referred to as chemical salts, contained in cylindrical iron drums, 31½ inches high and 22 inches in diameter. These drums were assessed for duty at 30 per cent ad valorem under that part of paragraph 151 of the tariff act of August 5, 1909, relating to "cylindrical or tubular tanks or vessels for holding gas, liquids, or other material, whether full or empty."

The protest claimed them to be usual containers and that their value should be included in the value of the merchandise contained therein, which it appears was dutiable at ad valorem rates under

¹ Reported in T. D. 31586 (20 Treas. Dec., 1921).

paragraph 3 of the tariff act of 1909. No question is made that the contents of these drums were not properly classified for duty.

The Board of General Appraisers sustained the protest from which the United States appealed, and the only issue here is whether these containers are dutiable under the quoted portion of paragraph 151 or whether they are dutiable as usual coverings at the same ad valorem rate as their contents, pursuant to the provisions of subsection 18 of section 28 of the tariff act of 1909.

The Board of General Appraisers, in sustaining the protest, followed their own decision in the Marx & Rawolle case (T. D. 30644), which was reversed in this court in the case of United States v. Marx & Rawolle (1 Ct. Cust. Appls., 152; T. D. 31210).

The importer submits neither brief nor oral argument in this court.

It appears from the evidence, and we assume the facts to be, in addition to those already stated, that the value of the contents of each container is 2.85 marks, but the monetary value of a mark does not appear; that the value of each container is about 96 cents; that these drums weigh less than 20 pounds each; that they are cylindrical in shape; that the chemical salts contained therein, which are a natural product, are heated and poured into the drums through a cap about 6 inches in diameter; that thereafter the contents solidify; that the only way of removing the same from the drum is by cutting it in two, but at what point or in what manner does not appear; and that it is not possible to remove the contents by heating the same and the drum, because the heat would cause the drum to come apart.

The evidence does not disclose that these drums are ever used for any purpose after their contents are removed, or in anywise become the subject of sale, or enter into the commerce of this country in competition with similar articles made here, or with the material from which they are made.

By inference, at least, the board found that they were the usual coverings or containers, and while the evidence is meager on this point, it is all one way, and we think on the whole it warrants such a conclusion.

The main contention of the United States is that the decision of the board in the Marx & Rawolle case, having been reversed in this court, it follows that reversal should likewise be had in this case.

We think it is unnecessary, in view of our decision in the case of United States v. Garramone (T. D. 31577), in which opinion is filed concurrently herewith, to enter upon a lengthy discussion of the principles involved; but that it is sufficient to say that the drums in this case appear to be the usual containers of the imported merchandise, the character and use of which as such containers is ended when the contents are removed therefrom; that thereafter such drums do not appear to be devoted to any useful purpose, or to be adapted thereto, or to

have any value, or to enter into or become a part of the merchandise of this country for any purpose. From the fact that when subjected to heat they come apart it would seem that they were not of durable construction. They are, therefore, clearly distinguishable from the containers involved in the Marx & Rawolle case, and although larger in size, fall within the classification of the containers involved in the Garramone case.

The result is that the judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* LEHN (No. 245).¹

1. COMPLETENESS OF RECORD QUESTIONED.

Where the appraiser in answer to a protest returned that no sample of merchandise had been retained because a sample correctly representing it had been retained in another case before the board, and where the cause had been submitted upon that return of the appraiser, it can not be urged that the testimony, so far as this concerned a sample, had been offered in the first case and not in the second; the return and the submission show it had been so offered.

2. MEDICINAL PREPARATIONS WITHOUT ALCOHOL.

The merchandise, guaiacol carbonate, having been found by the board to be a medicinal preparation that contained no alcohol and was prepared without the use of it, and the evidence submitted supporting this finding, the finding will not be disturbed; the importation was dutiable at 25 per cent under paragraph 68, tariff act of 1897.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23229 (T. D. 30585).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Brown & Gerry for the appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise the subject of this proceeding was assessed by the collector as an alcoholic medicinal preparation under paragraph 67 of the act of 1897. It is admittedly a medicinal compound known as guaiacol carbonate. The Board of General Appraisers reversed the collector's assessment, holding the article to be a compound in the preparation of which alcohol was not used, and directed its assessment at 25 per cent under paragraph 68 of the act of 1897. The two paragraphs read as follows:

67. Medicinal preparations containing alcohol, or in the preparation of which alcohol is used, not specially provided for in this act, fifty-five cents per pound, but in no case shall the same pay less than twenty-five per centum ad valorem.

¹ Reported in T. D. 31625 (20 Treas. Dec., 1072).

68. Medicinal preparations not containing alcohol or in the preparation of which alcohol is not used, not specially provided for in this act, twenty-five per centum ad valorem. * * *

The opinion of the board states:

The protests were submitted on the testimony taken in the case of Hoffmann-La Roche Chemical Works, Abstract 23078 (T. D. 30547), and upon the report of the appraiser wherein he states that the sample in the case at bar correctly represents the sample in the case above cited. No objection was made by Government counsel to the admission of either the testimony or sample. On the authority, therefore, of Abstract 23078, *supra*, we sustain the claim in the protests and overrule the decision of the collector in each case.

The assignments of error are, first, that the board erred in finding that the merchandise in question was dutiable as a medicinal preparation; nonalcoholic, and in not finding that the merchandise in question was a medicinal preparation containing alcohol or in the preparation of which alcohol is used, and in finding that the testimony in the case of Hoffmann-La Roche Chemical Works was sufficient to support the claim that the merchandise in question is a medicinal preparation not containing alcohol or prepared by the use of alcohol.

The last assignment of error is the one which raises the pivotal question in the case. It is said in the brief of counsel for the Government that the record does not show that the testimony in the case of Hoffmann-La Roche Chemical Co. was ever offered as a part of the record in this case, and until it was so offered there was no ground for objection.

We think Government's counsel are not in a position to raise this question. The assignment of error implies that the testimony in the Hoffmann-La Roche Chemical Co. case was a part of the record, and at the conclusion of the case the statement was made by counsel for the importer:

Submitted upon the statement of the appraiser that the merchandise is the same identically as in the Hoffmann-La Roche case, and that the sample in the test case of Hoffmann-La Roche is a proper sample in our case. Submitted.

The appraiser, in answer to the protest, returned as follows:

No sample retained from this shipment in view of the fact that a sample correctly representing the merchandise in question was filed with Protest 11897, Hoffmann-La Roche Chemical Co., May 17, 1909.

We think, therefore, the testimony in the Hoffmann-La Roche case may properly be considered.

Turning to that record we find the fact to be that a witness was produced who was the chief chemist and one of the managing directors of the Hoffmann-La Roche Chemical Co., who testified that guaiacol carbonate manufactured by that firm was prepared by a process with which he was familiar; that it contained no alcohol; and that no alcohol was used in its preparation. We have, then, evidence of a process of manufacture of a product of which the sample in the Hoffmann-La Roche case was representative, and which sample was

accepted by the Government's appraiser as correctly representing the merchandise in question, and evidence that this process did not involve the use of alcohol in its preparation. This, we think, was sufficient to show *prima facie* that the product here in question was not produced by the use of alcohol, and as there is no evidence in the case to overcome this *prima facie* showing, the conclusion of the Board of General Appraisers upon the facts should not be disturbed.

It follows that the decision of the board is *affirmed*.

SPIELMAN v. UNITED STATES (No. 267).¹

1. PAPIER-MÂCHÉ BOXES.

Separate provision is made by paragraph 418, tariff act of 1909, for boxes made wholly or in chief value of paper or papier-mâché, if covered with surface-coated paper; but such an *eo nomine* designation can not be taken to exclude the article so designated from an applicable part of the customs law enacted to simplify administration and to minimize frauds on the revenue.

2. SAME—CONTAINING NETTINGS.

The provisions of existing law relative to containers impose a duty, for example, on boxes, as boxes alone, when these are imported as merchandise. When they are brought in as usual containers of ad valorem goods they are subject to the specific administrative provision applicable to them when used in that way; and boxes covered with surface-coated paper and composed wholly or in chief value of paper or papier-mâché, containing nettings, are dutiable under paragraph 18, section 28, tariff act of 1909, as usual containers.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23441 (T. D. 30667).

[Affirmed.]

Brown & Gerry for the appellants.

D. Frank Lloyd, Assistant Attorney General (*William A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

During the month of October, 1909, certain nettings were imported into the country at the port of New York in boxes covered with surface-coated paper and composed wholly or in chief value of paper or papier-mâché. The collector of customs added the value of the boxes to that of the nettings, and on the total value thus made up assessed a duty of 60 per cent under the provisions of paragraph 402 and subsection 18 of section 28 of the tariff act of August 5, 1909, the pertinent parts of which read as follows:

402. * * * Nettings * * * composed of silk, or of silk and metal, or of which silk is the component material of chief value, * * * sixty per centum ad valorem.

SEC. 18. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the

¹ Reported in T. D. 31626 (20 Treas. Dec., 1074).

duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the manufacturer or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, *including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids*, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use or otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. * * *

The importer made no complaint as to the rate of duty imposed on the goods, but did protest that the value of the boxes should not have been added to the value of the goods and that the boxes should have been separately assessed for duty in the alternative under various paragraphs of the act, among them paragraphs 411 and 418, the pertinent parts of which read as follows:

411. Papers with coated surface or surfaces, not specially provided for in this section, five cents per pound; * * * bags, envelopes, printed matter other than lithographic, and all other articles composed wholly or in chief value of any of the foregoing papers, not specially provided for in this section, and all boxes of paper or wood covered with any of the foregoing paper, five cents a pound and thirty per centum ad valorem. * * *

418. All boxes made wholly or in chief value of paper or paper-mâché, if covered with surface-coated paper, forty-five per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

The appellants now argue that boxes of paper or papier-mâché are more specifically provided for under paragraph 418 than under subsection 18 of section 28, and that therefore they should be assessed for duty under the paragraph and not as directed by the subsection.

We hardly think that any question of relative specificity can arise between a paragraph of the tariff law proper and a section of the administrative part of the act. In our opinion, the real issue to be resolved here is whether a mere designation in the body of the tariff act of any of the articles mentioned as containers or coverings in subsection 18 is by itself enough to remove them from the operation of the administrative provision and subject them to the duties prescribed by the tariff.

Whether certain containers and certain coverings should or should not be considered a part of the value of the ad valorem goods which they contain or cover has been several times a subject of legislative

discussion. From March, 1823, to March, 1865, Congress elected to regard covering and packing charges as elements of the dutiable value of imported goods. In March, 1865, it changed its mind and repealed the provision which added the value of the container or covering to the value of ad valorem merchandise. The results of this repeal were evidently unsatisfactory, inasmuch as some 16 months later the value of the box, sack, or covering containing ad valorem goods was again made a part of their dutiable value. In 1883 there was a return to the rule of 1865, and it was expressly provided that the value of the usual and necessary sacks, crates, boxes, or coverings of ad valorem goods should not be estimated as a part of the value of the wares which they contained. There the matter rested until 1890, when Congress seems to have made a careful investigation, as a result of which it evidently came to the conclusion that good customs administration required that the value of certain containers and coverings should, as a general proposition, be regarded as a part of the value of the articles held by them. At all events, it seems to have committed itself to that policy to a certain extent by the act of June 10, 1890, and since the passage of that act there has been no general return to the policy of considering ad valorem goods and the coverings and containers thereof as separate entities for tariff purposes. In fact, the practice of so considering them appears to have caused so much embarrassment to appraising officers and to have been productive of so much trouble, fraud, and litigation, that in later years the legislative tendency has been all the other way. See *Austin, Nichols & Co. v. United States* (171 Fed. Rep., 79-80). Indeed, subsection 18 of section 28 of the act of August 5, 1909, enlarges section 19 of the act of June 10, 1890, so as to include casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids. From this extension of the language of the act of June 10, 1890, it may be fairly concluded that the Legislature has definitely settled to its satisfaction that for the ascertainment of dutiable value it is not practicable, generally speaking, to separate ad valorem goods from their usual containers or coverings, and that for tariff purposes the value of such containers or coverings should, as a rule, be considered as a part of the value of the goods.

In view of this history of the legislation on the subject of usual containers of ad valorem goods and of the apparently settled general policy finally adopted with regard to them, it would seem that the boxes under discussion, which are admittedly the usual containers of the nettings, should be dealt with as prescribed by subsection 18 of section 28 of the tariff act of August 5, 1909, unless they have been excluded from its operation by some other provision of law

which is controlling. Whether this particular class of containers is so excluded is therefore the question to be determined, and the solution of that question depends upon the construction to be given to paragraphs 411 and 418. If from either paragraph it can be fairly concluded that there was an intention to impose a separate duty on the boxes whether acting as usual containers or not, of course that intention should prevail against the subsection, the governing purpose of which is more to establish a rule of administration than to fix duties. *United States v. Nichols* (186 U. S., 298, 302-303).

Where articles available for use as containers have been subjected by a paragraph of the tariff act proper to duty "if filled with articles" or "whether full or empty" or "whether filled or unfilled, and whether their contents be dutiable or free," or where they have been expressly excepted from additional duty by such paragraph, the courts have held that such articles are thereby removed from the class of usual containers, and that they must be dealt with as prescribed by the paragraph. *United States v. Leggett* (66 Fed. Rep., 300); *United States v. Ross* (91 Fed. Rep., 108); *United States v. Dickon* (73 Fed. Rep., 195); *United States v. Marx & Rawolle* (1 Ct. Cust. Appls., 152; T. D. 31210); *Schmidt v. Badger* (107 U. S., 85).

So far as we have been able to discover, however, there is no decision to the effect that the *eo nomine* designation of an article which may be used as a container is by itself enough to exclude the article from that part of the customs law which is designed to minimize frauds on the revenue and to simplify administration. While paragraphs 411 and 418 impose a duty on paper boxes and boxes of papier-mâché, they do not in terms impose a duty on such boxes "filled with articles" or "whether full or empty" or "filled or unfilled" and therefore it can not be inferred that Congress was there dealing with them as containers. We think the purpose of the paragraphs was to impose a duty on these boxes only when they are imported as merchandise and that when they are imported as usual containers of ad valorem goods they should be subjected to the specific administrative provision which covers them when serving in that capacity. Such an interpretation of the paragraphs maintains the general policy as to usual containers, gives effect to both tariff and administrative provisions, and seems to us more reasonable than a construction not in line with the decided cases above cited and unsupported by the language which Congress has customarily used when it has thought it advisable to levy a separate duty on containers in a paragraph of the tariff act proper.

The decision of the Board of General Appraisers is therefore *affirmed*.

DUNN v. UNITED STATES (No. 429).¹

WRAPPING PAPER WITH DECORATED SURFACE.

To bring a wrapping paper with a decorated surface within the pertinent provision of paragraph 411, tariff act of 1909, it is unnecessary to show the decoration was placed on the paper by a separate and independent decorative process; the language of the statute is "whether produced in the pulp or otherwise," and it appears here the decorated effect was produced by the intentional use for that purpose of a particular kind of felt or felt blanket. It was dutiable under paragraph 411 of the act.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23665 (T. D. 30768).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation here is wrapping paper, returned by the appraiser as wrapping paper decorated, and assessed by the collector at 4½ cents per pound under paragraph 411 of the tariff act of August 5, 1909. The clause of the paragraph which is relied upon to sustain the assessment is as follows:

411. * * * Papers, including wrapping paper with the surface decorated or covered with a design, fancy effect, pattern or character, whether produced in the pulp or otherwise, but not by lithographic process, four and one-half cents per pound; if embossed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, five cents per pound and twenty per centum ad valorem. * * *

The appellants claim the paper is dutiable under paragraph 415 of the same act, the applicable part of which is as follows:

415. * * * Wrapping paper not specially provided for in this section, thirty-five per centum ad valorem. * * *

The Board of General Appraisers sustained the collector's action, relying as authority therefor upon their own decision in the Hempstead case, decided October 28, 1909, and reported in T. D. 30083.

The board found and counsel agree that the paper involved here is substantially like that considered in the Hempstead case.

There being no question as to the methods employed in the manufacture of this paper, we insert here a brief description thereof as given by one of the importers' witnesses:

The pulp is first made in the beaters, mixed in the beaters, carried from there through screens, and from there to the wire of the paper machine; it is formed on this wire, goes from there to the wet felt, then carried over the driers, one drier in that case, and it is dried and finished at the same time.

¹ Reported in T. D. 31627 (20 Treas. Dec., 1078).

The paper is colored, one surface appearing to be much smoother and more highly finished or polished than the other. Each surface presents a striped or plaid pattern, design, or effect which shows more clearly upon the highly finished surface and which constitutes a decorated effect. This effect is produced by the use of a felt blanket or sheet which is the felt referred to in the foregoing description of the process of manufacture. It is the peculiar weave of this felt which produces the decorated effect upon the paper, and the felt is designed and used to produce it.

The importers contend primarily that the "design, fancy effect, pattern, or character, whether produced in the pulp or otherwise," mentioned in that part of paragraph 411 under consideration, refers to something which is the result of a separate, distinct, and secondary process, and not something that is merely incidental to the process of manufacturing the paper. In support of this contention, it is argued by appellants' counsel that that part of paragraph 435 of the tariff act of 1897, relating to "imitations of diamonds or other precious stones composed of glass or paste, not exceeding an inch in dimensions, not engraved, painted, or otherwise ornamented or decorated," has been so construed by the board and by the courts that in order to render such imitations dutiable thereunder it must appear that the ornamentation mentioned therein had been produced by a super-added process of manufacturing the imitations. We have examined the authorities referred to by counsel and they support his argument. We do not, however, think the cases are parallel. The language of the statute here explicitly in substance provides that if the surface of a paper is decorated or covered with a design, fancy effect, pattern, or character produced in the pulp or otherwise, except when produced by lithographic process, the rate of 4½ cents per pound shall apply.

Pulp is the raw material from which the paper in this case is made, and the decorated effect produced upon its surface is the result of intentionally using in the manufacture of the paper a particular kind of felt or felt blanket which is designed to and does produce such effect.

The impression which the pulp receives from the felt, and which results in the decorated effect, is clearly comprehended in the words "whether produced in the pulp or otherwise," because this manifestly includes all the processes to which the final product, the finished paper, has been subjected before reaching its finished condition. Indeed, it is not easy to conceive how Congress could have used more apt language to include every stage of its manufacture, beginning with the pulp itself, than the words "whether produced in the pulp or otherwise." To give to these words the meaning contended for by the appellants would be in effect to read into the paragraph another exception perhaps more sweeping in its character than the one already there and which it was incumbent upon Congress to have inserted

therein if it was designed to give the paragraph the meaning contended for by the appellants.

The more natural construction, and we think the true one, is to say that by the words "whether produced in the pulp or otherwise, but not by lithographic process," Congress intended that every decorated effect, however produced, except by lithography, should render the paper presenting such effects upon its surface dutiable at the prescribed rates.

It is argued by the appellants' counsel that the rate assessed in this case is approximately 150 per cent ad valorem, and it is urged that this fact is of itself a strong argument in support of appellants' claim. It may be that giving the statute the construction which we think its unambiguous language demands will result in apparent inequality or injustice in this case, but if so, the remedy lies with Congress and not with the courts. It is further urged that, at the time the decorated effect upon the paper is thereto imparted by the felt, the substance to which it is imparted is no longer pulp but unfinished paper. We think it does not matter whether such be the fact or not. The paper is in the process of manufacture, and whether it be pulp or unfinished paper, the impression which produces the design is received and the decorated effect is "produced in the pulp or otherwise."

The importers further contend that the design or effect produced upon these papers is not upon the surface thereof but upon its body, claiming that for the purposes of the statute the surface of the paper should be regarded as separate and apart from its body. It is urged that there is a trade understanding that the surface of the paper is imparted to it by some process independent of the processes by which the body of the paper is manufactured. In other words, speaking from a trade standpoint, that paper has no surface until one has been imparted thereto by processes designed to accomplish that result and which are in addition to the processes by which the paper itself is manufactured.

The same question was before the board in the Hempstead case. While in its decision in the case at bar the board makes no allusion to that particular subject, yet, it is inferable therefrom that the board concluded the importers had failed to establish a trade understanding. We have examined the record upon this question and so conclude; but were it otherwise, the fact nevertheless remains, that the surface of the paper involved in this case presents the effects mentioned in paragraph 411, thereby clearly distinguishing its appearance from that of plain paper.

It would seem to be an unwarranted refinement of construction, in view of the explicit language of paragraph 411 under consideration, to say that the decorated effects therein referred to are only such as are produced by independent processes upon the surface of

the paper, thereby excluding the same if and when produced before the finishing processes were applied. Such a construction would render the words "produced in the pulp" nugatory and also involve the apparently untenable position that paper has *no* surface until it is finished.

The result is the judgment of the Board of General Appraisers is *affirmed*.

WANNER *v.* UNITED STATES (No. 430).¹

PARTS OF CHAIRS NOT LUMBER OR WOOD.

Where the importation consisted of the defined parts of a piece of furniture, it being apparent those parts were designed for a particular use and that their suitability for any other purpose had been destroyed, the merchandise is taken out of the category of lumber or wood, it has become, as in the case here, a partly finished chair or an article of house furniture partly finished, and as such is dutiable under paragraph 215, tariff act of 1909.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7066 (T. D. 30790).

[*Affirmed*.]

Churchill & Marlow (William A. Hines of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Charles Duane Baker on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise was assessed for duty by the collector of customs at the port of New York, whereat it was imported, as "House or cabinet furniture * * * wholly or partly finished," under the provisions of paragraph 215 of the tariff act of 1909. The importer's contention is that it is properly dutiable as "wood unmanufactured," under the provisions of paragraph 203 of that act.

At the hearing, the Government justified the assessment by the collector upon the grounds that not only is the merchandise properly described as "house or cabinet furniture wholly or in chief value of wood, wholly or partly finished," under the provisions of paragraph 215, but also properly included within the term "manufactures of wood," a part of the same paragraph.

The Board of General Appraisers affirmed the assessment by the collector. The importer appeals.

At the hearing before the board the importer, appellant here, sought to affix to the words "furniture * * * partly finished," a commercial signification applicable to this merchandise as imported. At the hearing in this court, however, the appellant expressly

¹ Reported in T. D. 31628 (20 Treas. Dec., 1081).

abandoned that contention and conceded the evidence in the record insufficient for that purpose.

It appears from the record and testimony therein by the representative of the importer that the merchandise consists of pieces of beech wood that have been originally cut to a size and thickness, and then wrought into certain shapes, and which eventually become chairs. The back, arms, legs, and sides of the chair are all included in this importation. After the wood is cut to a particular shape, it is put into a mold made of iron and steamed to make it soft and pliable. It is then put into a dry kiln until it is thoroughly dry, so that when it comes out and is taken from the mold it retains a permanent shape as molded. It has been planed, but at what time does not appear. The articles, as imported, constitute the respective parts and all such necessary to complete a chair. All that is necessary for the completion of the chair in the rough upon arrival of the merchandise in this country is to fit together the parts which have already been given shape and retained such at the time of importation.

The return of the appraiser and the testimony of the representative of the importer leave doubt whether or not the merchandise is polished or stained as imported and whether or not the screws necessary to join the same are a part of the importation. This, however, we regard as unimportant.

As imported, all the parts of the chair are together—the back, the arms, the legs, the sides, the seat, and all other necessary parts.

The following testimony by the representative of the importer concludes this phase of the controversy:

General Appraiser McCLELLAND. Well, were all the parts of the chair there ready to be assembled and put together?

The WITNESS. The parts that would make up a chair were all there; yes; that with which we could make up a chair, they were all there.

Q. What is done to these parts when you get them here?—A. When we get them we start first of all to fit them; to fit one to the other.

Q. One part to the other?—A. Yes; to bore them; to screw them together.

Q. I mean in this particular shipment.—A. In this particular shipment; that is what I am speaking of—to bore them, to assemble the parts, to fit the various parts one into the other, and to screw them together, then to finish the chair and finally to upholster it.

It further appears from the record that a part of the importation was already varnished ready for final use. It is further made apparent by the record that this so-called bent-wood furniture, which is made of the Austrian beech by reason of its superior qualities in that respect, such as this importation, may or may not be upholstered or attended by added parts or processes in completing the article ready for use, according to the taste and order for the particular class of chairs desired.

It is likewise apparent from the record in this case that this merchandise, from the processes which have been applied to it and its condition as imported, bears unmistakable witness to its subsequent use. Anyone looking at it as imported would readily understand from its appearance that it was intended for use as a chair. It is further apparent that as imported its suitability for any other use has been destroyed and its adaptability for the particular use intended, chairs, is fixed and certain. It has therefore been taken out of the category of lumber or wood, and by the processes of manufacture which have been bestowed upon it it has been so far put upon its ultimate course in the manufacturing processes incident to the making of chairs that it is unsuitable for any other purpose. All that remains to be done in this country is the assembling of the parts included within this importation, the adjusting of them one to the other, and the making permanent of this assembling by screws or other devices. That ultimate article and use is a chair, the processes in the manufacture of which have so far proceeded in this importation as to have concededly covered the greater part of the expenditure in its manufacture. It is therefore a chair, an article of household furniture of wood, partly finished. We think that the importation is clearly and explicitly within the language of the statute, and that the decision of the Board of General Appraisers should be *affirmed*.

JACKSON *v.* UNITED STATES (No. 463).¹

BRECCIA, A SPECIES OF MARBLE.

The provisions of the tariff act of 1909, construed *in pari materia* show a purpose to classify breccia and marble alike for dutiable purposes; to make them, whenever in similar conditions, dutiable at the same rate. "Marble," too, and "breccia in blocks" are more specific terms than "minerals crude or not advanced in value or condition," and moreover, according to the rule, where there are two provisions applicable, the one carrying the higher rate must be applied, breccia is held to be dutiable by similitude as marble under paragraph 111, tariff act of 1909.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7073 (T. D. 30797).

[Affirmed.]

Walden & Webster for appellant.

D. Frank Lloyd, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal is to determine the dutiable classification of breccia under the tariff act of 1909. There is involved a question of law, no serious controversy being had as to the facts.

¹ Reported in T. D. 31629 (20 Treas. Dec., 1883).

Breccia unquestionably is a species of marble. These invoices characterize a part of this importation at least by the term "marble" with certain descriptive words added, for example, "invoice of Numidian marbles, variety breche sanguine." It was agreed by all the witnesses who testified that breccia is used either with marble or independently as marble is used in interior decorations and for other purposes. While there may be certain qualities about breccia that might render it unfit for some of the purposes for which certain species of marble is suitable, it nevertheless is of the same genus limestone, and probably does not differ any more from some of the species of marble than other species of that stone would differ one from the other.

In the briefs and at the hearing counsel for the appellant, who is the importer, and counsel for the Government, in support of their opposite contentions invoked many well-known rules of classification applicable to customs law.

For many years, and under different tariff acts, breccia was provided for *eo nomine* as free. This is true of the tariff acts of 1883, 1890, 1894, and 1897. Prior to the tariff act of 1883 it was provided for *eo nomine* in different tariff acts, sometimes as dutiable and sometimes as free. Marble, likewise, in all of these acts was provided for *eo nomine*, with varying modifying phrases as to condition and manufacture.

In the tariff act of 1897 breccia was provided for in the free list specifically as "breccia, in blocks or slabs," and did not appear in any of the dutiable provisions.

In the various steps of the enactment of the tariff act of 1909, breccia was the subject of consideration. The House struck it out of the free list, but did not name it as specifically dutiable. The Senate did not change the provisions of the free list, but expressly inserted it in paragraphs 111, 112, and 114. In paragraph 112 it was inserted among the provisions for "Marble, breccia, onyx * * * wholly or partly manufactured * * *." In paragraph 114 it was inserted as excepting breccia from the provisions of that paragraph as made applicable to "Freestone, granite, sandstone, limestone, * * * not specially provided for * * * hewn, dressed, or polished * * *." In paragraph 111, under which the Government here claims the merchandise dutiable, it was inserted by enumeration with marble and onyx. In conference, paragraphs 112 and 114 were not in this respect changed, but breccia *eo nomine* was stricken out of the provisions of paragraph 111, which as enacted reads:

111. Marble and onyx, in block, rough or squared only, sixty-five cents per cubic foot; marble and onyx, sawed or dressed, over two inches in thickness, one dollar per cubic foot; slabs or paving tiles of marble or onyx, containing not less than four super-

ficial inches, if not more than one inch in thickness, eight cents per superficial foot; if more than one inch and not more than one and one-half inches in thickness, ten cents per superficial foot; if more than one and one-half inches and not more than two inches in thickness, twelve and one-half cents per superficial foot; if rubbed in whole or in part, two cents per superficial foot in addition; mosaic cubes of marble or onyx, not exceeding two cubic inches in size, if loose, one-fourth of one cent per pound and twenty per centum ad valorem; if attached to paper or other material, five cents per superficial foot and thirty-five per centum ad valorem.

The Board of General Appraisers held the merchandise dutiable under the provisions of paragraph 111 by similtude. The appellant contends that it is free of duty under the provisions of paragraph 626 of the free list of the act of 1909, which reads:

626. Minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially provided for in this section.

We may note in passing, for the purposes of consideration, that in paragraph 508 of the tariff act of 1897 breccia was provided for in the free list as follows:

508. Breccia, in blocks or slabs.

It is maintained by the appellant that inasmuch as certain manufactures of breccia are expressly provided for in paragraph 112 of the act of 1909, and was expressly excepted from the provisions of paragraph 114 of that act, that its insertion in paragraph 111 by the Senate and subsequent elimination therefrom in conference, indicated the intention of Congress to treat marble and breccia as different dutiable entities in contemplation of the tariff laws, and that this contention is further supported by the long-established practice of Congress in legislating with reference to each specifically.

While there is great force in this claim as a constructive postulate it is by no means conclusive of the case.

We think the action of Congress as witnessed in all of the provisions *in pari materia* shows a fixed purpose in the tariff act of 1909 to classify breccia and marble alike for dutiable purposes, and to make them in all similar conditions dutiable at the same rate. The importers' contention in this case conduces to that conclusion. In the solution of the problem presented, therefore, it must be approached ever bearing in mind that the general purpose of Congress was to make breccia dutiable and not free.

In the first place, the importers concede an obvious fact that paragraph 508 of the tariff act of 1897 was rejected, and that the claim of the importers for free breccia, if any such, must be maintained under paragraph 626 of the tariff act of 1909. This conceded fact is the first which tends to establish the intention of Congress to treat marble and breccia alike and make them in like conditions dutiable at the same rate. The provisions of paragraph 508 of the tariff act of 1897 making breccia in blocks or slabs free having been dropped, a much more limited provision for such, if at all applicable, was provided by

Congress, to wit, paragraph 626 of the tariff act of 1909. While there were no limitations whatsoever upon free breccia in paragraph 508, except that of being in blocks or slabs, in the provisions of paragraph 626 for crude minerals it must not only be crude but "not advanced in value or condition by refining or grinding, or of other process of manufacture," a more limited provision. If any classes of marble were free they would be free under paragraph 626 only, and if as contended by appellant Congress confined free breccia to this paragraph by striking out the express provision therefor, it put all free marble and breccia upon the same basis, and in so doing narrowed the classes of free breccia. Furthermore, by dropping the provisions of paragraph 508 of the tariff act of 1897 and confining all free breccia, if any such, to paragraph 626 of the tariff act of 1909, Congress not only put free breccia and free marble, if any such, in the same category, but it made all that did not come in free of duty under this provision dutiable under the provisions of paragraph 111 with marble, or 114 with manufactures of marble. This was accomplished not alone by the elimination of the free provision for breccia in the tariff act of 1909, but also by the excepting of certain breccia as it did similar marble from paragraph 114 of that act.

The purpose of paragraph 111 manifestly is to exclude from the provisions thereof such marble, onyx, and breccia which might otherwise fall within the provisions of that paragraph. This paragraph bears witness to the intent of Congress to treat alike for dutiable purposes marble and breccia.

Further evidence of this intention is found in paragraph 112, where the Congress by the act of 1909 expressly, though possibly out of an abundance of caution, inserted the word "breccia," putting it in the same classification with and dutiable at the same rate as marble when in the same condition.

With these accumulated evidences of the intent of the framers of the tariff act of 1909 to treat breccia and marble in all similar forms alike, both when free and for dutiable classification and rates of duty, before us, and the perfectly patent and expressed intention upon the part of Congress to make breccia dutiable, we are bound to proceed to the inquiry at hand with the purpose of giving effect to that intent if permitted by the rules of law and language of the statute.

It may be instructive to inquire the exact status of matters when the conference and the Congress in its final action had before it paragraph 111, and struck therefrom the word "breccia."

Presumably it had before it the case of *United States v. Jackson et al.* (113 Fed. Rep., 1000), decided by the United States Circuit Court for the Southern District of New York, which had held that under the provisions of the tariff act of 1897 breccia in blocks or slabs was entitled to free entry under paragraph 508 of that act. It had before it the provisions of paragraph 114 of the tariff act of 1897,

which were substantially identical with those of 111 of the tariff act of 1909, so far as pertinent. The court had decided that *by reason of the provisions of paragraph 508* of the tariff act of 1897 breccia, which otherwise would fall within paragraph 114 of that act and 111 of the act of 1909, was free of duty.

But breccia, as provided in paragraph 508 of the act of 1897, was no part of the act of 1909, and hence there was an inferential adjudication before Congress that the provisions of paragraph 111 of the act of 1909, as before them, would include such breccia as these importations without that word being inserted in the paragraph. The only necessary thing to make certain of this in all cases would be to insert it *eo nomine* in paragraph 114, so as to exclude it from the provisions of that paragraph, and to insert it *eo nomine* in the provisions of paragraph 112, so as to levy the higher rates upon breccia when further advanced than in paragraph 111, which Congress did, and in so doing provided for both as to classification and rates of duty, when in similar conditions, precisely the same.

When the Congress eliminated from the law the precise provision which had been construed would keep breccia out of the provisions of paragraph 111 and make it free, we can not find any inference that it intended to continue it free. It eliminated that which made it free.

With these accumulated evidences of the intent of Congress before us we do not see how the court can exclude from the paragraph something clearly included within its language, though it was momentarily thought necessary by one branch of the Congress to expressly include it by species but subsequently abandoned.

In *United States v. Jackson et al.* (113 Fed. Rep., 1000) the United States Circuit Court for the Southern District of New York held that under the tariff act of 1897 breccia in blocks or slabs was entitled to free entry, notwithstanding the fact that paragraph 114 of that act was in all essential particulars the same as paragraph 111 of the act of 1909. Counsel for appellant deduces from this that inasmuch as similar language has been construed by the court, and Congress adopted that language in the act of 1909, the same construction must be here given. But *United States v. Jackson et al.* did not construe essentially the same language. The competing paragraph there was paragraph 508 of the free list of 1897, which precisely enumerated such breccia, and which was construed in contest and together with paragraph 114 of the dutiable list of that act. Breccia not having been placed in the free list, *eo nomine*, of the tariff act of 1909, an entirely different statutory status is presented. The law *in pari materia* is entirely different.

Counsel for the importer now turns to another provision of the tariff law, as against the provision the subject of construction in the

Jackson case. This provision is 626 of the free list, which provides for minerals crude, as against the provision of paragraph 111, which provides for "marble, * * * in block, rough or squared only, * * *." For that reason that case is not controlling here.

We therefore approach the question whether or not breccia, an admitted species of marble, is or is not embraced within the terms of paragraph 111, or 626 of the free list, of the act? In so doing, we come impressed by the cognate law and rules of construction that it was the intent of Congress to make breccia dutiable. The force of any intendment deduced from the dropping in conference of the word, inserted by the Senate only, from the paragraph is not so great as where Congress in reenactment has eliminated a word previously existing in that law. This action might be construed an admission of its lack of necessity to carry out the intention of Congress everywhere else made apparent. In any event its force as an evidence of intent is certainly neutralized by the unmistakable evidences of the Congressional intent everywhere else manifested, and insufficient to exclude from paragraph 111 merchandise plainly, unmistakably, and admittedly within its express language. Breccia admittedly being a species of marble is undeniably included in the term "marble" as used in paragraph 111. There certainly is no contrary intent in anywhere here shown, and the words of the act are plain and unambiguous.

There is no question but that the importation falls within each of the paragraphs invoked. It is a species of marble, imported in rough blocks. It is a mineral, crude. No language could have been employed by Congress which would more accurately describe the importation. The question is, which paragraph prevails over the other.

The authorities upon this subject are uniform.

There is no safer or better-settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction. *Knox Co. v. Morton* (68 Fed. Rep., 787-789); *Railway Co. v. Sage* (71 Fed. Rep., 40-47); *Railway Co. v. Phelps* (137 U. S., 528-536); *Lake County v. Rollins* (130 U. S., 662, 670, 671).

It requires no citation or argument to show that "marble," breccia, "in blocks" is more specific than "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture." Moreover, as between the two paragraphs one provides a duty and the other does not, and we are confronted with a mandatory provision of Congress in section 7 that where merchandise falls equally within two paragraphs, the one imposing the higher rate of duty is applicable. For these reasons we are of the opinion that the merchandise is directly dutiable under paragraph 111 as a species of marble, and the decision of the Board of General Appraisers should be accordingly affirmed.

UNITED STATES *v.* THOMSON (No. 496).¹

SPRUCE LUMBER, HOW MEASURED AND HOW DUTIABLE.

It appearing to be the reasonable custom to estimate lumber by the size of the thin end, it is not permissible, for dutiable purposes, to take the average after a measurement of both the thick and the thin ends; and it further appearing, from a preponderance of the evidence, that when lumber delivered as being $1\frac{1}{2}$ inches in thickness, it is actually measured on the basis of $1\frac{3}{4}$ inches and so settled for, the importation of $1\frac{1}{2}$ -inch spruce lumber was properly held dutiable as $1\frac{3}{4}$ -inch material.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24024 (T. D. 30969).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These two cases involve the question of the proper measurement of spruce lumber imported from Canada. It was entered and the entry liquidated as $1\frac{1}{2}$ -inch lumber. Subsequently by direction of the Assistant Secretary of the Treasury the entry was reliquidated on the basis of 2 inches, on which reliquidation the importers appealed to the Board of General Appraisers, where the action of the collector in reliquidating was set aside, and a new reliquidation ordered on the basis of $1\frac{3}{4}$ inches.

The question involved is mainly a question of fact. The evidence in the case shows, practically without contradiction, that by the custom of the trade $1\frac{1}{2}$ -inch spruce is not recognized as a merchantable denomination, but that when lumber is delivered $1\frac{1}{2}$ inches in thickness, it is actually measured on the basis of $1\frac{3}{4}$ inches and so settled for. This rule of measurement was recognized by the department as early as September 5, 1882 (T. D. 5379), and so far as the record shows, this ruling has been recognized by the Treasury Department since that time.

There was also evidence on the part of the importer which showed that when it is ascertained that a board measures thicker at one end than at the other, the thin end is taken as the true measurement, and there is no dispute about this custom of the trade. To illustrate, if a board is 2 inches or more at one end, and is $1\frac{3}{4}$ inches at the other end, it would be entered as $1\frac{3}{4}$ -inch stuff. The testimony by the shippers and by those who had to deal with the lumber tended to show that this lumber was in fact practically all $1\frac{3}{4}$ inch according to this

¹ Reported in T. D. 31630 (20 Treas. Dec., 1089).

standard. Much of it ran as high as $1\frac{1}{2}$ inches, some boards were found that measured 2 inches or more at the thick end, or as scant as $1\frac{1}{2}$ inches at the thin end.

The testimony would be very convincing and indeed very conclusive if it stood uncontradicted. The Government, however, produced two Government inspectors who testified that they found the lumber to scale 2 inches in thickness. The testimony shows that they examined but a small portion of the lumber, relatively, and what is more significant is that by their testimony it appears that if they found the lumber running a trifle over 2 inches at one end and scant at the other end they attempted to average the piece and determine that it should measure 2 inches. The answer of one witness is illustrative:

I found the majority of it 2 inches even, some of it running a trifle over 2 inches, and some a trifle less, which would bring the average at 2 inches.

And in response to the question:

Q. You think it's impossible to get the exact thickness in rough lumber?—A. It can be done by taking time to go over every piece at both ends and averaging the thickness. On rough lumber it doesn't run the same.

The other witness for the Government testified:

Q. Suppose you found lumber full 2 inches at one end, did you measure the other end to see if it would run over that or not?—A. As a rule we measure about two-thirds from the end.

Q. You never measure the thin end?—A. We do measure the thin end; yes.

Q. Which controls; thin or thick?—A. Neither one. I generally take the average.

It is manifest that these witnesses ignored the established trade custom, and a custom which appears very reasonable on its face, of estimating the lumber upon the basis of the thin end.

The other testimony offered by the Government was evidence that this lumber was sold as 2-inch lumber. The evidence shows that it is the custom which obtains in the wholesale trade of selling scant 2-inch lumber and billing it as 2-inch lumber, the difference to the wholesaler being made in the price, and by a number of witnesses it was shown that lumber billed at the price at which this was purchased was treated and regarded as settled for on the basis of $1\frac{1}{2}$ inches. The proof upon this point is very strong and convincing.

The Board of General Appraisers found for the importer upon this branch of the case, and held upon the question of fact that the importer had established his case by a preponderance of the evidence. A careful reading of the same fails to convince us that there was error in this finding.

The decision of the board is *affirmed*.

DAVISON v. UNITED STATES (No. 498).¹

1. "COLORED" DEFINED.

The word "colored" is a participial adjective used generally with the meaning of "having a color." The color's origin does not enter into the essential meaning of the word.

2. A PAPER MADE OF MATERIAL WITH AN INHERENT COLOR.

A paper manufactured of natural barks or reeds having an inherent color that persists through all processes to which it may be subjected and remains a characteristic of the finished product is a colored paper; and copying paper made of it is colored copying paper, dutiable under paragraph 397, tariff act of 1897.

United States Court of Customs Appeals, May 22, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,
G. A. 6758 (T. D. 28975).

[Affirmed.]

Joseph G. Kammerlohr (*John Giblon Duffy* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The appellants imported into this country a quantity of copying paper from Japan. The collector classified it as "copying paper" within the provisions of paragraph 397 of the act of 1897, and assessed upon it a duty of 6 cents per pound and also 15 per cent ad valorem.

The appellants protested, contending that the paper was not within the description of the paragraph because it was not white, colored, or printed as required by its terms, and that it properly fell within the provisions of paragraph 402 as paper not specially provided for in the act.

This protest was overruled by the board, and the appellants now pray for a reversal.

Paragraph 397 reads as follows:

397. Papers commonly known as copying paper, stereotype paper, paper known as bibulous paper, tissue paper, pottery paper, and all similar papers, white, colored, or printed, weighing not over six pounds to the ream of four hundred and eighty sheets, on a basis of twenty by thirty inches, and whether in reams or any other form, six cents per pound and fifteen per centum ad valorem; if weighing over six pounds and not over ten pounds to the ream, and letter copying books, whether wholly or partly manufactured, five cents per pound and fifteen per centum ad valorem; crepe paper and filtering paper, five cents per pound and fifteen per centum ad valorem.

¹ Reported in T. D. 31631 (20 Treas. Dec., 1901).

It is practically conceded by the appellants that the paper in question meets all the requirements of the above paragraph except only the specification as to color. The paragraph, as stated, includes three kinds, namely, white, colored, or printed. This paper is obviously neither white nor printed, and the appellants contend that it is not colored. On the other hand, the Government contends that the paper is colored; and this makes the sole question in the case. If the paper is "colored," it falls within the terms of the paragraph.

The paper is manufactured in Japan from natural barks or reeds. These have an inherent color which persists throughout the manufacturing processes and is imparted to the finished product. Without the addition therefore of any added or foreign pigments the paper so manufactured has a decided tan or buff color.

The appellants do not deny the existence of this color as a quality of the finished paper, but they contend that nevertheless the paper should not be called "colored" because of the fact that its color resulted as a mere incident to the manufacture of the article as paper, and was not produced by any additional application of color. They contend that the word "colored" as here used does not mean simply that the paper should have a color, but also that such color should be produced by some pigment added to the manufacturing process for that purpose, in addition to the materials entering into the production of the article as paper. The Government of course contradicts this definition.

The word "colored" is a participial adjective used frequently and even generally with the meaning of "having a color." The dictionaries sustain this statement. Such a definition of the word is almost invariably the first one given by such authorities. And the origin of the color or the method of its production in the article does not enter into the essential meaning of the term, which taken alone simply describes an existing quality or condition. In general speech, too, if an article has a color it is called colored. This applies with especial force to the paragraph in question which undertakes to describe the article by its qualities rather than by the method of its manufacture. Inasmuch, therefore, as this paper has a color it may aptly be described as colored, and it therefore comes within the description of the paragraph.

It appears that in the corresponding paragraph of the present tariff act the words "colored or uncolored, white or printed" are used instead of the words "white, colored or printed." However, we do not regard this as having the effect of a legislative indorsement of the view advocated by the appellants.

The decision of the board is therefore *affirmed*.

UNITED STATES *v.* WHITE (No. 514).¹

1. "GAUFFRE" DEFINED.

"Gauffre" is a word of French derivation and is variously spelled gauffre, gauffree, gouffre, goffer, gauffer, gaufre, and gauffer. It accords in meaning with embossed.

2. GAUFFRE LEATHER UNDER TARIFF ACT OF 1909.

The fact that "gauffre" had no fixed uniform trade meaning as applied to leather when the tariff law of 1909 was enacted can not be taken to shift the burden of proof on the Government in determining whether the skins imported were gauffre leather; there is necessary simply an inquiry as to what was intended by the Congress in using "gauffre leather" in that act, and to give effect, if may be, to the actual language employed. The word "cut" there appearing, it would seem was used to impress the customary features of gauffre leather, definite sizes and shapes, but in any view can not be taken to defeat the plain intention as to the dutiable status of the goods. The rate of duty was clearly ascertainable and the importation is dutiable as gauffre leather under paragraph 451, tariff act of 1909.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7115 (T. D. 31016).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Alfred S. Hall for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This merchandise was imported at Boston. The collector at that port assessed it for dutiable purposes at the rate of 15 per cent plus 10 per cent ad valorem under the provisions of paragraph 451 of the tariff act of 1909, as "gauffre leather." The importer claims that it is properly dutiable under the same paragraph at 15 per cent ad valorem, alleging that "these goods were entered as 'finished leather' dutiable at 15 per cent ad valorem, which we claim should be so assessed under paragraph 451 of the tariff act of August 5, 1909, which includes 'all the (sheepskins) foregoing not specially provided for in this section, fifteen per centum ad valorem.'"

The merchandise presents a light gray appearance, approximating that of silver. It is concededly embossed by the use of a stamp, the impressions of which are plainly visible upon the reverse side of the merchandise, presenting raised effects upon the surface. There are added upon the surface figures in black. The appearance presented is that of a finished or ornamental leather in imitation of a lizard's skin.

It appears from the protest that the appellee is an importer and manufacturer of bookbinders' materials and fine leathers.

The collector returned that the merchandise was, in the opinion of his office, "gauffre leather."

¹ Reported in T. D. 31632 (20 Treas. Dec., 1093).

The Board of General Appraisers sustained the claim that the merchandise was properly dutiable as "sheepskins dressed and finished not specially provided for."

At the hearing before the board but two witnesses testified, a member and an employee of the importing firm. Their testimony, and the whole thereof, is succinctly epitomized by the board in its opinion when it states:

Two witnesses, both members of the importing firm, it is true, but of long experience in buying and selling leather of the character involved, and whose testimony is unimpeached, unite in saying that in all their experiences in the leather business they have never heard, up to the time of filing of this protest, the term "gauffre leather" used in this country, and that they had been importing and selling this particular kind of leather for seven years prior to the date of this importation and had never heard of it being called "gauffre leather," nor had any of their previous importations been so classified.

The Government offered no testimony. The case was therefore submitted upon the testimony thus epitomized, the return of the collector, and the official sample described.

The board held that the testimony offered so far disputed the return of the collector as to shift the burden of proof upon the Government.

We are unable to agree with the board in this conclusion. We have examined the testimony with care and find its import expressly as stated by the board. The fact that testimony tended to establish is that the term "gauffre leather" was not at the time of this importation known to the leather trade, and that, therefore, the terms used in the statute were not used with reference to a general uniform trade understanding. So that the result established by this testimony, if anything, would be that there was not a trade understanding confining the particular merchandise within the term "gauffre leather," and excluding therefrom all others. But that testimony in no wise negatives the existence of a descriptive force that may attend the words of the statute which includes this importation.

That these leathers as imported are within the descriptive force at least of the term "gauffre leather" is shown by previous decisions of the Board of General Appraisers and of the courts. Thus in G. A. 3730 (T. D. 17744), as early as December, 1896, merchandise was imported at the port of New York invoiced as "gauffre leather," and was the subject of decision by the Board of General Appraisers and held dutiable as skins dressed and finished under the tariff act of 1894, rather than as manufactures of leather. The board ascertained in that case the imported merchandise to be finished leather ready for use as wall decorations and other purposes. On appeal to the United States Circuit Court for the Southern District of New York this decision was in 1898 reversed, and upon further appeal to the United States Circuit Court of Appeals, Second Circuit, the decision of the Circuit Court reversing that of the board was in 1899 affirmed.

The Circuit Court of Appeals described the merchandise the subject of this decision as "so-called 'leather gouffré'" and stated that it was constituted of "pieces of thin leather, cut uniform, 28 inches in width and from 32 to 36 inches in length. One side is plain, while the other surface presents an embossed pattern, coated with designs in silver and various attractive colors. These pieces are not used in the imported condition, but are cut up and made into dress trimmings. There is evidence that they are sometimes cut up and used in the manufacture of pocketbooks and other fancy leather goods. Sometimes, when thicker than these at bar, so that paste will not strike through, they are used as "wall decorations." The courts held that they were dutiable as leather not specially provided for, and not as skins dressed and finished, reversing the decision of the board.

It will be noted that these court decisions were both rendered after the enactment of the tariff act of 1897; that *gauffre* leather, *eo nomine*, was neither a provision of the act of 1894 nor 1897.

Later and in December, 1899, the Board of General Appraisers, in G. A. 4611 (T. D. 21819), again had before it what is characterized in its opinion importations invoiced as "*gauffré* leather" that were essentially the same as those described in the court decision quoted, and were held dutiable by the board as leather not specially provided for under the provisions of the tariff act of 1894, and not as skins dressed and finished or manufactures of leather, the protests having arisen under that act, though the decision was rendered after the repeal of that act and during the life of the tariff act of 1897.

The lexicographic definitions of *gauffre* are as follows:

Oxford Dictionary:

Goffer, gauffer.—Also * * * *gauffre*, to stamp or impress figures on cloth, paper, etc., with tools on which the required pattern is cut, f. *gaufre*, honeycomb. The usual sense of the English word is in French expressed by *gauffer à la paille*, trans. To make wavy by means of heated *goffering*-irons; to flute or crimp.

Standard Dictionary:

Goffer.—1. To form plaits or flutes in; crimp; * * * 2. To raise in relief, as leather; *gauffer*, honeycomb.

Century Dictionary and Cyclopedia:

Goffer.—(Also written *gauffer*; * * * crimp, * * * figure * * *.) 1. To plait, flute, or crimp. 2. To raise in relief, especially for ornamental purposes, as thin metal, starched linen, or the like.

(It should be noted that the word being of French derivation is, when used in the same sense, spelled variously as *gauffre*, *gauffré*, *gouffre*, *goffer*, *gauffer*, *gaufre*, and *gaufferer*.)

These definitions accord with those of the term "embossed," and it is admitted by all parties to the record that this merchandise, as imported, is embossed. It has in addition to embossing certain ures in jet or black. It appears, likewise, from the decisions quoted

that the merchandise the subject of these decisions was embossed, although in addition thereto were figures in silver and other fancy effects. The essential, however, of gauffre leather, as defined by lexicographic authority, and giving those words their natural descriptive force, is leather which has been embossed.

Considering the record in this case and decision of the board in the light of these decisions and authorities, it is manifest that while the record discloses that there is no commercial signification attached to these words "gauffre leather," they have a descriptive force frequently applied to such leather that precisely covers this importation and which is uncontradicted by any testimony in this record.

There was before the board the return of the collector and a sample of the imported merchandise, both of which unmistakably evidence what is admitted by all parties to the record in this court, to wit, that the importation consists of embossed leather, to which there has been added colored figures for fancy effect.

We think that the record thus shows, without the slightest contradiction, that the imported merchandise was within the descriptive force of "gauffre leather" as used in the statute and that the board erred in holding the contrary.

We are then confronted with the modifying language of the statute and its application to the imported goods. There is no evidence in this record which discloses whether these importations were in the form of strips, such as those the subject of the court decision cited, or whether or not they were "cut" from leathers. That they are leathers is admitted by protestant. They were entered by protestant as "finished leather." They are alleged in the protests to be of "sheepskins." It is fairly within the record, therefore, by admissions made by protestant, that the importations are leathers made from sheepskins, and, therefore, we think included within the terms "all other leather," as used in the paragraph under consideration. The use of the word "cut" in the paragraph under consideration seems inapt, unless the term be applied commercially to those strips of gauffre leather alone defined in the decisions quoted. There is no testimony upon that point in this record, and so far as this record discloses trade and commerce affixes no limitation or other definition to that term measured by shape or size. In its descriptive force it would apply to any size or shape of leather embossed in the manner stated. We do not think, however, this use of the word as in this paragraph should be held to defeat the manifest purposes of Congress. It was undoubtedly the intention of Congress to levy upon these finished leathers, to which had been applied additional processes in order to emboss them and to give them fancy effects, an additional rate of duty to that levied upon the leathers from which they are made. The use of the word "cut" in the statute is in one sense

instructive and indicates that when Congress adopted this phrase it had in view the purpose of embracing and making subject to this additional duty the gauffre leather spoken of in the court and board decisions quoted. Such leathers were "cut" because they were in strips of such definite size and shape as to impress the reader that these were customary incidents of gauffre leather.

There being no evidence here that the term has other than its common and descriptive signification, which is not confined to any size or shape of leather, we must hold it descriptively applicable to these importations. That was accomplished and the additional duty levied by the use of the words "gauffre leather" alone. The remaining portion of the phrase is not used by way of description or limitation of the article upon which duty is levied, but *is a term or phrase of reference only*, indicating and pointing out the leather elsewhere in the act made dutiable, to which rate this additional rate is added. It is a term of reference and not of description. That basic provision is variable, dependent upon the proof as to what leather the particular gauffre is made from, which proof we think is fairly established in this case by the appellee's admissions in his protest.

It was the unmistakable purpose of Congress to levy an additional duty upon gauffre leather. The inapt use of the word "cut," as a word of reference to a class of merchandise and rate of duty clearly and unmistakably ascertainable, should not be held to control the application of this rate of duty to the subject matter intended by Congress to be made subject thereto. That such inapt language may be disregarded to carry out the plain and manifest intention of Congress finds ample support in numerous authorities. Thus in Lewis's Sutherland Statutory Construction, section 410, it is stated:

SEC. 410. Legislative enactments are not any more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute. * * *

And in the American and English Encyclopedia of Law, under the headings, Statutes, Principles of Interpretation and Construction, vol. 26, p. 613, the doctrine is as follows:

When the intention of the legislature as gathered from all legitimate sources is taken into consideration, terms and provisions not expressly declared may be introduced into a statute by necessary or plain implication from what is directly or expressly declared. By "necessary implication" is not meant an implication that points to a result so as to leave no possible escape and to exclude every other imaginable conclusion, but one that leads to such a conclusion as, under the circumstances, a reasonable view compels the court to take, the contrary of which would be improbable or absurd.

And in Endlich on the Interpretation of Statutes, section 295, the rule is given in this wording:

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a

construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done, sometimes, by giving an unusual meaning to particular words; sometimes by altering their collocation; or by rejecting them altogether; or by interpolating other words; under the influence, no doubt, of an irresistible conviction, that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give the true intention.

Numerous instances of the application of this principle are found in the decisions of the courts. *United States v. Burr* (159 U. S., 78), *Atkins v. Disintegrating Co.* (85 U. S., 272, 300), *Wheeler v. McCormick* (29 Fed. Cases, 901).

We are of the opinion, therefore, that this importation was properly assessed by the collector and that the decision of the Board of General Appraisers should be *reversed*.

FRANK v. UNITED STATES (No. 562).¹

CARMELITE WARE.

The importation is of earthenware cooking utensils known as carmelite ware and these are in the shape of bowls. The bowls have had imposed on them a thin white layer of vitreous glass, forming a smooth, hard coating that differs in color and character from the body on which it is laid and so constituting a new surface. These articles are enameled; they are recognized in the trade as enameled, and as such they were properly dutiable under paragraph 93, tariff act of 1909. They were in fact assessed erroneously at a lower rate than the proper rate, and accordingly, as the appellants are not in a position to complain, the decision of the board is affirmed.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24234 (T. D. 31103).

[Affirmed.]

Walden & Webster (Henry J. Webster of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

In the year 1909, after the present tariff act went into effect, the appellants imported from Germany a consignment of earthenware cooking utensils known as carmelite ware. The articles were small bowls, casseroles, etc., made of a superior quality of finely ground clay. There are two exhibits filed in the case, one being a small pudding dish, the other being a shirred-egg dish, and these are said to be similar in character to the other articles included within the importation.

The collector held that the merchandise fell within the provisions of paragraph 94 of the act, and was therefore dutiable at 55 per cent ad valorem. The appellants protested against that assessment and claimed that the articles were dutiable at 35 per cent ad valorem

¹ Reported in T. D. 31633 (20 Treas. Dec., 1098).

under paragraph 95 of the act. Certain alternative claims were made by appellants, but this is the claim insisted upon by them.

The board heard the protest upon evidence and overruled the same, which ruling is now presented to this court for review.

The following three paragraphs of the act of 1909 contain the enactments which control this case, and they are therefore copied in full.

93. China, porcelain, parian, bisque, earthen, stone and crockery ware, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware; painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, sixty per centum ad valorem.

94. China, porcelain, parian, bisque, earthen, stone and crockery ware, plain white, plain brown, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware, not painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, fifty-five per centum ad valorem.

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem; carbon, not specially provided for in this section, twenty per centum ad valorem; electrodes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, thirty per centum ad valorem.

As has been stated, the merchandise was classified by the collector under paragraph 94 and assessed at 55 per cent ad valorem, but it is now conceded by the Government that this ruling was incorrect. On the other hand, the Government maintains that the collector erred in favor of appellants, and that the goods should have been assessed at 60 per cent ad valorem as enameled earthenware, under the provisions of paragraph 93. This contention of the Government and the corresponding protest of appellants, together make up the issue now appearing in the case. The question, therefore, is whether or not the articles composing the importation are enameled earthenware within the meaning of paragraph 93 as above copied.

The outer body of each of the vessels in question is composed of brown clay. This constitutes the frame of the article and gives it its full form and shape. Within the concave bowl of each vessel is a thin layer of white material which covers the inner surface and which is laid upon the brown clay before going into the kiln. The brown clay forms by far the larger bulk of the article, the white layer being quite thin and comprising not more than one-tenth of the material of the vessel. The entire surface of each piece, both inside and out, is also covered with a smooth, transparent, vitreous glaze.

The materials entering into the construction of the articles are named by a witness who manufactures in this country wares similar

to those at bar. His testimony is not contradicted in the record so far as it relates to the materials composing the articles.

The brown part of the vessel is made of brown clay, into which an addition of oxide of iron is mixed. The white layer is made of china clay, with additions of ball clay, some lead, cobalt, and oxide of tin. The vitreous glaze is made of glass and oxide of tin. The materials composing the white lining of the bowls and also the glaze are the same as those used to enamel steel hollow ware to produce the white inner surface which protects the metal base from the action of corrosive acids.

The witness above referred to also states that the white lining of the vessels and the vitreous glaze were known in the trade as enamel. In this, however, he is contradicted by two other witnesses, who have been engaged in the trade for many years, not as manufacturers, but as merchants, and who never heard the term "enamel" applied to such a finish.

The appellants contend that neither the white lining nor the glaze can be called enamel; that the one is essentially a part of the structure of the bowl and is simply white chinaware, and that the other is transparent, whereas enamel must be colored or opaque.

Various definitions of the word "enamel," taken from dictionaries, are quoted by counsel in their briefs, but the following are the ones which seem to be most apt and authoritative.

Murray's English Dictionary:

Enamel (n.): 1. d. In recent use applied to any composition employed to form a smooth, hard coating on any surface (e. g., on pottery, wood, leather, paper, etc.). cf. Enamel v. 2.

Enamel (v.): 2. In various extended uses:

a. To apply a vitreous glaze by fusion to (surfaces of any kind, e. g., pottery).

Century Dictionary and Cyclopedia:

Enamel (n.): 1. In ceram., a vitrified substance, either transparent or opaque, applied as a coating to pottery and porcelain of any kind. It is simply a fusible kind of glass, and when transparent is commonly called a *glaze*. A vitreous coating of similar character is applied to a class of iron utensils for cooking, etc., and is made to serve other useful purposes.

These definitions show that a recognized and authorized extended or secondary meaning has been given to the word "enamel" as applied to such manufactures as those at bar; that it is applied to "any composition employed to form a smooth, hard coating on any surface," such as pottery. The white glaze imposed upon the bowls of steel hollow ware is thus called enamel, and is so designated in paragraph 158 of the tariff law.

In the light of these definitions the thin white layer imposed upon the brown frame of the bowl, covered as it is by a vitreous glaze, may properly be called enamel. That layer is in the nature of an added

surface covering the real body of the article, and is composed of the same materials as those forming the steel-ware enamel above mentioned. It forms a smooth, hard coating different in color and character from the body upon which it is laid, and it constitutes simply a new surface for the article. It is also doubtless true that this has come to be recognized in the trade under the name of enamel so generally as to be established as a trade designation, even if it were not an ordinary meaning of the term. This appears from the testimony of the Government witness.

This conclusion finds further confirmation in the history of the recent and present legislation upon this subject.

In the tariff act of 1897 it was provided in paragraph 95 that earthenware "painted, tinted, stained, enameled, printed, gilded, or *otherwise* decorated or ornamented in any manner" should be dutiable at 60 percent ad valorem, but if plain white and without superadded ornamentation of any kind it should be dutiable at 55 per cent ad valorem.

In December, 1899, the Circuit Court of Appeals, Second Circuit, decided the case of *Koscherak et al. v. United States* (98 Fed. Rep., 596), which involved the construction of a similar provision relating to glass bottles contained in paragraph 90 of the tariff law of 1894. In that paragraph it was provided that all glass bottles when cut, engraved, painted, colored, printed, stained, etched, or *otherwise* ornamented or decorated * * * should be dutiable at 40 per cent ad valorem. Paragraph 88 of the same act made plain glass bottles dutiable at a different rate. In construing the language of paragraph 90, above named, the court in the case just cited held that the cutting, engraving, painting, coloring, printing, staining, or etching of the glass bottles "must be substantial and sufficient to amount to an ornament or decoration," otherwise the bottles would be assessed as plain glass bottles under paragraph 88 of the act. This was by force of the word "*otherwise*" appearing as it did in the construction.

According to this decision, therefore, the provision of paragraph 95 of the act of 1897 for a rate upon earthenware enameled or *otherwise* decorated or ornamented in any manner would apply only where the enameling was "substantial and sufficient to amount to an ornament or decoration." Any enamel which was not decorative or ornamental in character would not bring the enameled article within the scope of the paragraph.

When Congress, in 1909, drafted the present paragraph 93, the same provisions for enameled earthenware were contained within its terms, except that the word *otherwise* was omitted therefrom. This omission was certainly not inadvertent. It is indeed fair to conclude that it was made in answer to the decision in the above-named case or at least with full knowledge of it. The omission eliminated from paragraph the single term which, according to the decision, required the enameling to be substantial and sufficient to amount to

an ornament or decoration in order to bring the enameled article within its provisions. This amounted to an expression of legislative purpose to include within the provision for enameled earthenware such enameling as did not amount to an ornamentation or decoration of the article. In the manufacture of the articles at bar this condition appears. The white inner layer is a covering of the surface of the article to promote its usefulness rather than to improve its appearance, and is not an ornament or decoration in the ordinary sense of those terms as applied to enameling. It seems, therefore, to fall within the class created by the paragraph as thus changed, in which an enameling is recognized that might be called industrial, as contradistinguished to jewelers' enameling. It is not meant that these are statutory terms; they are used by way of illustration only.

This presents the conclusions of the court upon the merits of the case. There are various questions of procedure presented by the brief of appellants, but some of them are not properly saved for review here and the others do not appear to be substantial.

There is no error apparent in the record to the prejudice of appellants, and the decision of the board is therefore *affirmed*.

SCHIFF *v.* UNITED STATES (No. 538).¹

PLATEAUX, FLAT ROUND ARTICLES MADE OF STRAW BRAIDS.

The importation was of articles circular in form, slightly convex, but nearly flat in shape, with the appearance of plain round mats of braided straw, but without a crown and untrimmed: *Held*, since the evidence shows the material to be so constructed as to permit of being blocked into hats, without adding any new material, and that it is so blocked, being practically useless for any other purpose, it was dutiable under paragraph 409, tariff act of 1897, as hats composed of straw partly manufactured and untrimmed. It was so dutiable, though more than one piece of goods was sometimes employed in the making of one hat.

United States Court of Customs Appeals, May 22, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,
G. A. 6481 (T. D. 27718).

[*Affirmed*.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

On January 18, 1906, the appellants imported into this country a quantity of plateaux, which are flat, circular bodies composed of straw braids and used in the manufacture of straw hats. They are made in various sizes; the representative sample first put in evidence is 22 inches in diameter. However, some are larger and some smaller than that size.

¹ Reported in T. D. 31634 (20 Treas. Dec., 1102).

The collector held the importation to be untrimmed straw hats, dutiable at 35 per cent ad valorem under the provisions of paragraph 409 of the act of 1897.

The appellants duly filed their protest to this ruling and advanced various alternative claims in contravention to the collector's classification. The one, however, which appellants chiefly rely upon is that the importation is dutiable at 30 per cent ad valorem under paragraph 449 of the same act as manufactures of straw not otherwise specially provided for.

This issue was duly heard upon evidence by the board and the decision of the collector was sustained. The appellants now pray for a reversal. The case comes to this court by transfer from the United States Circuit Court, Southern District of New York, where additional testimony was taken as appears by the record.

The two sections of the tariff law of 1897 which are referred to in the presentation and discussion of this issue, namely, 409 and 449, respectively read as follows:

409. Braids, plaits, laces, and willow sheets or squares, composed wholly of straw, chip, grass, palm leaf, willow, osier, or rattan, suitable for making or ornamenting hats, bonnets, or hoods, not bleached, dyed, colored or stained, fifteen per centum ad valorem; if bleached, dyed, colored or stained, twenty per centum ad valorem; hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, osier, or rattan, whether wholly or partly manufactured, but not trimmed, thirty-five per centum ad valorem; if trimmed, fifty per centum ad valorem. But the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof.

449. Manufactures of bone, chip, grass, horn, india-rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof.

The Government contends that the imported articles are properly described as "hats, composed of straw, partly manufactured, but not trimmed," and therefore dutiable under paragraph 409; whereas the appellants maintain that the articles can not be called hats at all, either wholly or partly manufactured; that they are only materials to enter into the making of hats; and that they should be classified as manufactures of straw not specially provided for, and dutiable as such under paragraph 449.

As has been stated, the plateaux as imported are circular in form, slightly convex but nearly flat in shape, and they have the appearance of plain round mats of braided straw. They have no crown nor other like resemblance in shape to a finished hat, and are of course untrimmed.

The plateaux are imported to be used in the manufacture of men's hats, and practically all such importations are used in that

A very few are said to be made into flower holders or similar

articles, but such uses are so rare that they do not substantially qualify the foregoing statement.

The testimony is somewhat contradictory as to the manner in which the plateaux are used in the making of hats. It appears, however, that a single plateau may be made into a hat without the addition of any other straw or like material by a process of pressure and manipulation, and that many are thus made. It also appears that two plateaux may together be used in the making of a single hat. In such case one is blocked into a crown and the other is used for the brim, the center of the latter form being first cut out and the two pieces being then joined together. It appears also that a plateau may be folded or bent by hand by milliners and held in place by a form of wire in such manner as to be trimmed, and thus become a finished hat for woman's wear.

The fashions of course change, and the trade demands different kinds of hats at different seasons. Some of the witnesses therefore are doubtless more familiar with one of these processes and some with another. But the facts are substantially as briefly stated in the foregoing outline.

The language of the paragraph provides for hats composed of straw partly manufactured but not trimmed. These straw forms or bodies are intended to be made into finished hats; they are so constructed that they may generally be blocked into hats by a process which adds no new material to them and does not substantially change them except as to shape; and they are practically useless for any other purpose except to be finished as hats. A person familiar with such manufactures would therefore see in each plateau a hat which required for its completion only a process of blocking and trimming. The plateau would in that view be a hat in process of manufacture, one whose manufacture had been begun and had been carried far enough to identify it as the article which was to be finished from it. It would therefore be a partly manufactured hat. It would not have a crown, which is generally the most distinguishing feature of a finished hat, and therefore it would not look like a hat to a person unfamiliar with the business; but such provisions of the law relating to a manufacture are in a sense addressed chiefly to those who are engaged in it or are at least familiar with its processes. Such persons would have no difficulty in understanding the nomenclature which describes the plateau as a partly manufactured hat. This view is sustained by the history of the subject appearing in the decisions cited by counsel.

Nor is it altered by the fact that often two plateaux are used to make a single hat. From the testimony it is probable that this method was much less common before the adoption of the act than since, and the language of the act followed the process of manufacture which was then generally pursued

A single plateau may be blocked into a single hat; it may be bent and formed into one by a milliner's manipulation; such a use was and is common in the trade; and the plateau may therefore fairly be called a partly manufactured hat, even if the changing processes in the industry do at times favor the use of two such forms for the making of a single hat.

The decision of the board is therefore *affirmed*.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

SALOMON *v.* UNITED STATES (No. 532).¹

POWDERED TALC NOT FRENCH CHALK.

Powdered talc is a substance in itself, not a material made up of a mineral substance; and having a proper regard for the rule that language employed in an act is presumed to have been used in accordance with the construction which has been given it by a long-continued practice of an administrative department or by a court, powdered talc may not be deemed French chalk and dutiable as such, but it is dutiable as a manufactured article under paragraph 480, tariff act of 1909.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7128 (T. D. 31088).

[Reversed.]

Curie, Smith & Maxwell (W. Wickham Smith of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Edwin R. Wakefield* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN. Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in this case consists of powdered talc. The collector assessed a duty of 35 per cent ad valorem under paragraph 95 of the tariff act of 1909, which reads as follows:

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem; carbon, not specially provided for in this section, twenty per centum ad valorem; electrodes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, thirty per centum ad valorem.

The importer protested, claiming the article to be dutiable at 20 per cent ad valorem under paragraph 480 of said act, which reads as follows:

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part not provided for in this section, a duty of twenty per centum ad valorem.

After hearing before the Board of General Appraisers, in which considerable testimony was taken on both sides, the board decided the articles to be dutiable at 1 cent per pound under paragraph 13

¹ Reported in T. D. 31635 (20 Treas. Dec., 1105).

of the tariff act of 1909, either by specific provision or by virtue of the similitude clause. Paragraph 13 is as follows:

13. Chalk, when ground, bolted, precipitated naturally or artificially, or otherwise prepared, whether in the form of tubes, blocks, sticks or disks, or otherwise, including tailor's, billiard, red, or French chalk, one cent per pound; manufactures of chalk not specifically provided for in this section, twenty-five per centum ad valorem.

From that decision an appeal is taken to this court.

Disposing first of the classification of the collector, we think the board was right in holding that it can not be sustained. This article, while a mineral substance, is a mineral substance ground. Paragraph 95 relates to articles composed wholly or in chief value of earthy or mineral substances, whether susceptible of decoration or not. The plain meaning of this language is "articles or wares made up of" a mineral substance, and not the substance itself, which the ground talc clearly is.

Upon the question of whether this article is classifiable as French chalk, the testimony of the witnesses was to some extent conflicting. The witnesses for the Government, while testifying that French chalk and ground talc were synonymous terms, indicate very clearly by their testimony that the usual sale name of the article here imported is talc or talcum. The witnesses so order it when ordering and so sell it when selling. Their testimony means little more than that according to their opinion the substance of French chalk and the substance of talcum is the same. The witnesses on the part of the importer make this clearer. But were this left in doubt, we think the history of the legislation and the decisions of the Board of General Appraisers fortify the claim of the importers and make their position in this case unassailable.

The question was presented to the board in the case of *McNear v. United States* (T. D. 24864), where the identical merchandise here involved was the subject of decision. It was claimed there, as here, that under the corresponding paragraph 13 of the act of 1897 the importation was dutiable as "ground French chalk," the importer claiming, as here, that the merchandise was properly dutiable at 20 per cent ad valorem under the provisions of that act relating to unenumerated manufactured articles. The board found, on the report of the Government chemist, that the term "French chalk" was frequently used in technical works as synonymous with "steatite" or "soapstone." When used without limiting or qualifying words, the French chalk in pieces suitable for marking cloth is generally meant. If powdered, the fact is generally stated. The term French chalk is a misnomer, chalk being a native soft carbonate of lime, while talc, soapstone, French chalk, are hydrated silicates "of magnesia."

The board reaffirmed the decision in T. D. 23027, where it was held that chalk, as used in the first and last parts of paragraph 13, "relates only to the article generally known in commerce and technically by that name, and which, according to accepted authority, consists of

carbonate of lime or natural form of calcium carbonate, and does not include earthy hematite, neddle, red ocher, or clay colored with ferric oxide, or the like," and that from the analysis showing the merchandise in question to be hydrated silicate of magnesia and not carbonate of lime, it was clear that the importation in question was not chalk in fact nor the chalk of commerce. The board also reaffirmed its decision in T. D. 23028.

But the board held further—and this is significant—that the contention of the chemist at the port of New York that the words "French chalk" when used without limitation or qualification "covers only the article used by tailors for marking clothing, seems to be borne out by the language of paragraph 13." That language was quoted, and emphasis was placed upon the words "including tailors', billiard, red, or French chalk." The board said:

While it is true, as appears from the testimony taken by this board in other cases involving this identical article, that it is sometimes known as French chalk and soap-stone, it is equally true, as shown by such testimony, that it has no uniform and unvarying trade designation, and that it is most generally known in trade and commerce as talc.

It is quite clear that Congress intended to, and did in fact, only cover the article which was well known to trade and commerce as chalk, when made up in any form, except when medicinal or prepared for toilet purposes, and recognizing that certain articles, such as tailors' chalk, billiard chalk, and French chalk, which are invariably made up in the form of cubes, blocks, sticks, or disks, were not in fact chalk, provided for them *eo nomine*, as otherwise they might not fall within the class of articles mentioned in the paragraph as chalk.

Two cases were subsequently decided by the Board of General Appraisers prior to the enactment of the statute of 1909. In *Doggett v. United States* (T. D. 28425) it was held that irregular pieces of sawed talc about 5 inches long and varying in width and thickness, used by ironworkers as pencils in marking on iron, were dutiable as French chalk. This was based upon testimony introduced by the Government to the effect that talc in the form in which it was imported in that particular case is the same as French chalk, expressly named in paragraph 13.

It will be noted that this case is not opposed to the holding of the board in the previous decision in *McNear's case*, as the board in that case recognized that articles of talc in the form of blocks, sticks, or disks were provided for in paragraph 13, at the same time holding that powdered talc was not French chalk or chalk of any kind.

The question again came before the board in T. D. 29763, *Abstract No. 21245*, the case of *Kraemer & Foster*. In that case, as appears by the fuller report of the case on appeal, in 180 *Federal Reporter*, 638, the article was imported in the form of cubes, it having been finished by sawing, and its chief use was shown to be in gas burners and electric insulation. The board found this to be French chalk, following the decision in T. D. 28425. This case again was within the exception noted by the board in *McNear's case*, as the

importation was in the form of cubes, which were evidently treated by the board in that case as coming within the term "French chalk."

It will be seen, therefore, that when Congress had the question before it and enacted the provisions of section 13 of the act of 1909 powdered talc had been differentiated from French chalk and had never been treated or assessed as French chalk, nor, so far as the record shows, had the Treasury Department attempted to so treat it after the decision in *McNear's* case. Indeed, as early as 1892, in T. D. 12458, the board has held this article to be dutiable as an unenumerated manufactured article. This was repeated in T. D. 19485, and the only later attempt shown to assess ground talc as French chalk was that which proved unavailing in *McNear's* case. The rule that language employed by Congress is presumed to have been used in accordance with the construction which has been given it by long-continued practice of an administrative department or by a court is thoroughly established. See *Shallus v. United States* (1 Ct. Cust. Appls., 556; T. D. 31552) and cases cited; *United States v. Myers* (1 Ct. Cust. Appls., 257; T. D. 31301); *Komada v. United States* (215 U. S., 392).

We think the board was in error in holding this importation to be French chalk, and that it was properly dutiable as an unenumerated manufactured article.

The decision of the board will be *reversed*.

UNITED STATES v. AMERICAN EXPRESS CO. (No. 566).¹

CAVIAR—"OTHER PRESERVED," PARAGRAPH 270, TARIFF ACT OF 1909.

An examination of the legislative record shows that the "situation as it existed" was known when the paragraph making caviar dutiable under tariff act of 1909 was "pressed upon the attention of the legislative body"; and the words "other preserved" employed in that paragraph are not to be taken to defeat a manifest intention of the Congress, and there being no evidence to show what process the caviar of the importation may have been subjected to, it was dutiable under paragraph 270, tariff act of 1909.—*United States v. Cohn* (2 Ind. Ter., 474); *Hubbard v. City of Taunton* (140 Mass., 467); *Kelly v. The People* (132 Ill., 363). *Hansen v. United States* (T. D. 30769) distinguished.

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7152 (T. D. 31205).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Joseph G. Kammerlohr (*John Giblon Duffy* of counsel) for the appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise is caviar imported in tins. It was assessed for dutiable purposes at 30 per cent. ad valorem under the appropriate provision of paragraph 270 of the tariff act of 1909, which reads:

270. * * * Caviar, and other preserved roe of fish, thirty per centum ad valorem.

¹ Reported in T. D. 31636 (20 Treas. Dec., 1109).

The allegations of the importer, appellee here, is that the merchandise is entitled to free entry under paragraph 560 of the act, which provides:

560. Eggs of birds, fish, and insects (except fish roe preserved for food purposes): * * *

The board sustained the protest upon the statement—

From an examination of the testimony it is quite evident that the merchandise is in all respects like that passed upon by the United States Court of Customs Appeals in the case of *Hansen v. United States* (T. D. 30769), wherein such merchandise was granted free entry as eggs of fish not preserved for food purposes.

While we do not believe this finding of fact supported by the affirmative evidence in the record, we do not deem the facts controlling in this case.

The collector returned the merchandise as "caviar packed in printed tin cans."

The only testimony adduced at the hearing was that of the examiner in the office of the local appraiser at New York, who testified that the merchandise was in the same condition as imported as was the merchandise the subject of *Weber v. United States*. It seems manifest that the examiner was confining that statement as to the condition of the tins in which the merchandise was packed; that is, that it was packed in tin cans with printing thereon. That was the only testimony upon which the finding of the board was based.

The record in the Hansen case showed the precise processes adopted for the preparation and preservation of the merchandise from the time it was taken from the sturgeon of the Caspian Sea until the time it entered into ultimate consumption. There is not a word in this record as to any of the processes adopted in the preparation or preservation of this merchandise at any time, save that it was imported in tin cans not hermetically sealed, but having labels printed thereon. It is obviously consistent with this proof that it may have been subject to various and innumerable processes of preservation in that condition. We do not think, therefore, that the testimony in this record establishes that the merchandise was similar to that the subject of the Hansen decision by this court. We think, however, that this case may be properly determined as a question of law.

It was further held by the board that the words "other preserved," in paragraph 270, related back to and modified the word "caviar," effecting that all caviar made dutiable by this paragraph must be *preserved* caviar. We do not agree in this conclusion.

The question of intent of the legislative body in all cases of statutory construction and interpretation, if it can be ascertained, is of

primary importance. In that ascertainment the Supreme Court of the United States has laid down as one of the canons of construction the following:

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy, and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *Holy Trinity Church v. United States* (143 U. S., 457, 463); *United States v. Trans-Missouri Freight Association* (166 U. S., 290).

What, then, was the situation "as it existed," and what, with reference to this matter, "was pressed upon the attention of the legislative body"?

It appears from the record that at the time of the enactment of the tariff act of August 5, 1909, the attention of the Congress was called to the fact that caviar was not specifically provided for in any of the provisions of the tariff act of 1897, and that it had been held by the court in *Menzel v. United States* (142 Fed. Rep., 1038; T. D. 27118), February 1, 1906, that when imported in tin packages it was dutiable by similitude as fish in tin packages at the rate of 30 per cent ad valorem; that that was true also when imported in packages of less than 100 pounds; but when imported in packages of 100 pounds or over it paid a specific duty of three-fourths of 1 cent per pound, the equivalent of eighty-five one-hundredths of 1 per cent.

In the presence of this "situation as it existed," and "the attention of the legislative body" being directed thereto, as indisputably appears by this record, the express provision for caviar in paragraph 270 was inserted in the tariff act of 1909 and became the law.

While this status legally informs the court of facts from which an intention to make caviar dutiable is manifestly shown, that intent alone can not be held to constitute the law unless the language actually employed by Congress to that end legally and fairly effects this manifest intent and purpose. *Jones v. Guaranty, etc., Co.* (101 U. S., 622, 626); *Holy Trinity Church v. United States* (143 U. S., 457, 463); *Smythe v. Fiske* (23 Wall., 374, 380); *United States v. Babbit* (1 Black., 55, 61); *Raymond v. Thomas* (91 U. S., 712, 715); *Indianapolis, etc., R. R. Co., v. Horst* (93 U. S., 291, 300); *Hawaii v. Mankichi* (190 U. S., 197, 212); *Postmaster General v. Early et al.* (12 Wheat., 135, 152).

That caviar is expressly designated in the dutiable section of the law establishes that it was the intent of Congress to make caviar dutiable, and that being established as the intent of Congress, the inquiry is, Is the language adopted for that purpose sufficient or insufficient? Has the employment by the Congress in this provision of the words "other preserved" necessarily defeated that intent? We think not.

There are two well-settled rules of interpretation applicable to the word "other" as used in this statute. The one applies its modifying force to that which precedes it which would include the word caviar; the other applies its modifying force to the subjects following. It is the duty of the court in such cases to adopt that rule of construction which will give effect to the intention of Congress as ascertained, and not give effect to that rule of interpretation which would defeat the manifest purpose of the lawmakers. Each of these rules of application is supported by abundant authority, but the principle determining which and when each shall be applicable according to the ascertained intent of the lawmakers is a well-settled and uniform rule. Thus, in *United States v. Cohn* (2 Ind. Ter., 474, 493, 494), the United States Court of Appeals had before it for construction the words "other intoxicating drinks" in an act of Congress prohibiting the sale of any "vinous, malt, or fermented liquor or of any other intoxicating drinks whatsoever." The court stated:

It is contended by the learned counsel for the defendant that the words "and other intoxicating drinks," used after the language prohibiting the manufacture, sale, giving away, etc., of any vinous, malt, or fermented liquors, are to be taken as words limiting and explaining the meaning of those words which precede them to be that the articles thus named are intoxicating also. We think that this is *not necessarily the only construction* that can be given to the words. We have already seen that the legislature, in the exercise of the police powers of the Government, may, acting upon a subject within its powers, designate even a harmless article as being hurtful, and that such designation is binding on the courts. So in this case we think that the statute is subject to the construction that Congress intended to say that vinous, malt, and fermented liquors were intoxicating, and then, because a large class of intoxicants such as whiskies, brandies, gin, and all other ardent and spirituous liquors had not been named in the statute, the words "all other intoxicating liquors" were intended to cover them. And whatever may be the exact grammatical construction of the language courts are not always bound to follow it. If by other methods allowed by the law it can be determined that Congress otherwise intended, the court will give such construction to the statute by lawful methods it may find Congress actually intended. *The intent of the statute is law.*

So the Supreme Court of the State of Massachusetts, in the case of *Hubbard v. City of Taunton* (140 Mass., 467), having before it for interpretation the phrase "for armories, for the celebration of holidays, and for other public purposes," said:

The word "other" implies that the celebration of holidays is a public purpose within the meaning of the act, and indicates that purposes which are public only in that sense are included within its scope, although they look rather more obviously to increasing the picturesqueness and interest of life than to the satisfaction of rudimentary wants, which alone we generally recognize as necessary. We know of no simple and merely logical test by which the limit can be fixed. It must be determined by practical considerations. The question is one of degree. But, in reply to the petitioner's argument, we may say that, if the purpose is within the act, we do not see why the city council may not create the occasion. *Taking into account the history and language of the act*, the safeguards attached to the exercise of the power, the smallness

of the sum allowed to be expended, and the fact that it has long been assumed to be within the power of cities to give such concerts in the open air, we are not prepared to say that a case is presented for an injunction.

The Supreme Court of the State of Illinois, in *Kelly v. People* (132 Ill., 363), applied the rule in a criminal case wherein the language of the statute was "larceny or any other felony," declaring:

We therefore conclude that the words "or other felony," in section 23, were intended to designate such other offenses besides murder, rape, mayhem, robbery, and larceny as amount to felonies, and that they were not intended to limit the offense of assault with intent to commit larceny to assault with intent to commit that higher grade of larceny which is defined to be felony.

The doctrine was announced by the Supreme Court of the State of Wisconsin in a similar criminal statute speaking of larceny "or other felony," the court stating:

We are unable to give the statute the construction contended for. The statute must be read as though instead of the words "or other felony" it had been written "or any other offense for which the offender, on conviction, shall be liable, by law, to be punished by imprisonment in the State prison." (*Nichols v. The State*, 35 Wis., 308.) We think the term "or other felony" is not a limitation on what preceded, but is inserted to extend the scope of the section to other offenses not specifically named therein. Thus, an intent to commit arson or mayhem or to inflict upon some person great bodily harm, and doubtless other offenses, are brought within the section by the use of that term.

The application of the doctrine, as justified by the Supreme Court of the State of Wisconsin, is properly applicable to customs revenue cases to give effect to the manifest intent of the Congress by the use of such phrases by way of extension.

Whether the word "preserved" before the word "other" takes import from the word "caviar" as following and influenced by that word is not here necessary of decision. The whole sentence might be held a legislative determination that that which constitutes "preserved roe of fish" shall be deemed to be a condition of fish roe resembling conditions or degrees of preservation represented by caviar. Nor do we deem it necessary to consider whether or not the status or degree of preservation of "preserved roe of fish" following the word "caviar" legislatively fixes the status or degree of preservation of caviar in order to bring it within the statute. Without deciding or giving weight to any of these latter suggestions we think the unmistakable intent of the Congress was to make all caviar dutiable at 30 per cent ad valorem, and since that intent can be made effective by applying the well-settled rule of interpretation in the manner considered to the language here employed by Congress it is our duty to so do. It follows that the Board of General Appraisers erred in its conclusion.

The decision of the Board of General Appraisers is therefore *reversed*.

RHODES *v.* UNITED STATES (No. 585).¹

DIRECT SHIPMENT FROM THE PHILIPPINES.

The importation was of sponges, and these, it appears, were dispatched, freight prepaid, from Zamboanga via Hongkong and Tacoma, Wash., to Chicago. They were delivered by the agents on board a vessel lying in or off the port of Hongkong. The evidence to this effect makes a *prima facie* showing that the goods were shipped direct, and there being no evidence to show there was any delay in the course of the shipment, the consignment was entitled to free entry under section 5, tariff act of 1909, governing articles the growth or product of the Philippine Islands.—United States *v.* United Cigar Stores Co. (1 Ct. Cust. Appls., 450; T. D. 31505).

United States Court of Customs Appeals, May 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24523 (T. D. 31182).

[Reversed.]

Lester C. Childs for appellant.

D. Frank Lloyd, Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in question consisted of 33 bales of sponges shipped to James H. Rhodes & Co., at Chicago, Ill., from Zamboanga, Moro Province, P. I., via Hongkong and Tacoma, Wash., per steamer *Changsha*.

The goods were assessed for duty at 20 per cent ad valorem and are claimed to be free of duty under section 5 of the act of August 5, 1909, as "articles the growth or product of * * * the Philippine Islands," and that they come within the proviso of that section, which reads as follows:

And provided further, That the free admission, herein provided of such articles the growth, product, or manufacture of the United States, into the Philippine Islands, or of the growth, product, or manufacture, as hereinbefore defined, of the Philippine Islands into the United States, shall be conditioned upon the direct shipment thereof from the country of origin to the country of destination.

The board overruled the protest on the ground that the direct shipment from Zamboanga to Chicago with transshipment at Hongkong was not proved. The basis of this ruling was that certificate of origin was deemed by the board to have been too late, as it was made long after the importation. But it bears date the 27th of September, 1909, and as the shipment had been made before that date, and as the certificate of origin was made almost immediately after the regulation requiring it was prescribed, we think this criticism is not justified.

The case is therefore not distinguishable from United States *v.* United Cigar Stores Co. (1 Ct. Cust. Appls., 450; T. D. 31505), if there is evidence in the record which justifies us in holding that the goods were shipped by vessel to be transshipped at Hongkong and were there transshipped.

¹ Reported in T. D. 31637 (20 Treas. Dec., 1113).

The consular invoice states that the goods were sold to the consignees and dispatched from Zamboanga via Hongkong and Tacoma, Wash., per steamship *Changsha*. At Hongkong the bill of lading shows, "Shipped or delivered for shipment in apparent good order by Butterfield & Swire, as agents, on board the steamship *Ning-chow*, lying in or off the port of Hongkong * * *" the goods in question, "*ex Changsha a Zamboanga*," and notes "Freight paid in Zamboanga."

We think this sufficient *prima facie* to show that the goods were shipped direct and without any intention of delaying shipment in the port of Hongkong, and there is nothing in the record to show that they were so delayed. The case falls within *United States v. United Cigar Stores Co.*, *supra*.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* HARPER (No. 482).¹

FANS COMPOSED OF WOOD AND SILK.

The principle is recognized that, when it clearly appears from the language and context of a proviso it is intended to apply to other subjects than those stated in the paragraph of which it is a part or that it is intended to apply generally to other parts of an act, the proviso must, so far as possible, be given full effect; but this principle will not be applied *ex industria* to bring an article within the operation of the proviso. Each case must be determined on the facts of that case; and though the question here is not entirely free from doubt, resolving this doubt, as is proper, in the importer's favor, fans composed of silk and wood and embroidered with silk were dutiable under paragraph 427, tariff act of 1897, which specifically names for duty "fans of all kinds, except common palm leaf fans."—*Lai Ming v. United States* (T. D. 30770) distinguished.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from United States Circuit Court, Northern District of California, G. A. 5235 (T. D. 24073).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Stanley Jackson for the appellee.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue here is whether fans composed of wood and silk, and embroidered with silk, are dutiable at the rate of 50 per cent ad valorem under paragraph 427 of the tariff act of July 24, 1897, which reads as follows:

427. Fans of all kinds, except common palm leaf fans, fifty per centum ad valorem. or at the rate of 60 per cent ad valorem under the provisions of paragraphs 390 and 339 of the same act, the pertinent parts of which are as follows:

390. Laces, * * * embroideries and articles embroidered by hand or machinery, * * * all of the above-named articles made of silk, or of which silk is the component material of chief value, not specially provided for in this Act, * * * sixty per centum ad valorem: * * *

¹ Reported in T. D. 31655 (20 Treas. Dec., 1155).

339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck ruffings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of ruffings, tuckings, or ruchings; all the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this Act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this Act upon any embroideries of the materials of which such embroidery is composed.

The collector assessed the fans as embroideries of silk at 60 per cent ad valorem. The Board of General Appraisers, upon hearing the importers' protest, and the Circuit Court for the Northern District of California, upon hearing the appeal by the United States, both sustained the importers' claim that duty should have been taken at the lower rate, under the provisions of the paragraph first above quoted.

No sample of the importation is before us and no issue of fact is raised.

In substance, the main contention of the United States is that these embroidered fans are *articles*, and that the embroidery thereon being of silk, they are clearly subject to the rate of duty specified in the silk paragraph by virtue of the proviso in paragraph 339, unless the meaning of the word "article" in said proviso can be restricted by some principle of law so as to exclude it therefrom. It is said that the rule of *ejusdem generis* can not accomplish this result, and various decided cases are cited tending to support that claim. It is also further urged that the question of whether or not paragraph 427 is more specific than paragraph 339 does not enter into this case; that the blanket proviso of "wearing apparel or other article or textile fabric" found in the said proviso was expressly designed to apply to every embroidered article which might anywhere be mentioned in the statute; that therefore the ordinary rule as to the superiority of "specific" provisions over "general" provisions can have no application; that if otherwise, although it may be conceded that the words "fans of all kinds" in paragraph 427 are specific, yet they lack such a degree of specificness as to prevail over the all-comprehending terms of the proviso in that regard; and that to give them such an effect will nullify the plain purpose of Congress as expressed in the proviso.

On the other hand, it is contended by the appellees that the language of paragraph 427 indicates that all fans except palm-leaf fans

shall be assessed at 50 per cent ad valorem; that the words "of all kinds," which follow the word "fans," and which in turn are followed by the exception relating to common palm-leaf fans, are such a clear expression of the legislative intent that, although it may have been held in other cases that the blanket provisions of the proviso should prevail over certain more or less specific terms in other paragraphs there under consideration, nevertheless, in this case, as applied to this merchandise, the question of whether the proviso or paragraph 427 is the more specific does arise, and that giving legitimate force to the recognized doctrine that the more specific of two paragraphs shall prevail, duty must be taken at the lower rate. In this connection the appellees further urge that Congress having specially exempted common palm-leaf fans from the operation of the paragraph, the familiar principle of *expressio unius est exclusio alterius* clearly indicates a Congressional intent that no fans except common palm-leaf fans should be exempted from the provisions of paragraph 427.

The United States argues that the decision of this court in the case of *Lai Ming v. United States* (1 Ct. Cust. Appls., 5; T. D. 30770) is decisive of the issue here, and we consider first this claim. It appears from the opinion of the court, by Hunt, judge, that the question presented was whether certain Chinese shoes or slippers composed of leather in chief value and embroidered with silk should be dutiable at the rate of 60 per cent ad valorem under the same paragraphs as are here invoked to support the Government's claim, or at 25 per cent ad valorem under paragraph 438 of the same act, the material part of which was "* * * boots and shoes made of leather twenty-five per centum ad valorem." In that case we said:

It is our opinion that the words "wearing apparel," as used in the proviso of paragraph 339, include shoes, and that if such shoes are embroidered by hand or machinery, as are the exhibits submitted with this record, they must be held to be dutiable as provided by the terms of the proviso.

It will be observed that this language implies that it was considered of importance that the shoes or slippers involved in that case were wearing apparel, thus clearly bringing them within the proviso, and that although the learned judge writing the opinion referred to other decisions wherein the effect of this proviso had been construed, occasion was taken to say that:

We cite these opinions to illustrate the views of the several courts, though we do not mean to go any further than the particular case before us warrants. As to it we hold the proviso applies.

It is obvious that our decision in that case was designed to be expressly limited to the facts there appearing, and we think that the facts here and the different phraseology of paragraph 427, as compared with that of paragraph 438, which we then contrasted with the proviso of paragraph 339, clearly distinguishes that case from the one at bar.

In this case, as in the *Lai Ming* case, we expressly decline to go outside the precise issue involved. We neither assent to nor dissent from the reasoning of the circuit courts or the circuit courts of appeals, upon whose decisions the Government relies in this case, preferring to take such a position only when the issues raised necessarily involve that step.

We recognize the principle that when it clearly appears from the context and language of a proviso that it is manifestly intended to apply to other subjects than those stated in the paragraph of which it is a part, or that it is intended to apply generally to other parts of an act, it must, so far as possible, be given full effect, and we proceed to inquire whether the proviso in question applies to these fans.

The specific articles referred to in paragraph 339 are numerous, and the terms of the proviso, which embrace "wearing apparel or other article or textile fabric when embroidered," are of broad scope, and undoubtedly, unless otherwise limited, apply to the fans in question. On the other hand, the words "fans of all kinds" in paragraph 427 are of specific import. The expression "fans of all kinds," which means all kinds of fans, naturally suggests every imported fan, regardless of its component material or condition. Perhaps a greater degree of specificness could have been attained by using after the word "fans" the words "of all kinds, shapes, sizes, and of whatever material," and yet that is somewhat a matter of taste rather than a question of the use of appropriate language to clearly express the specific thought.

The contention of the Government in its last analysis would seem to be that in order to exclude these fans from the effect of the proviso, fans embroidered should have been specifically excepted therefrom, or that paragraph 427 should read something like this: "Fans of all kinds, including embroidered fans of whatever material composed and excepting palm-leaf fans," etc.

While such language would probably have prevented the question arising which we are called upon to decide, we do not think, in the absence thereof or of its equivalent, it can be said that paragraph 427 does not apply to the fans in this case.

We think a most convincing reason why the contention of the importers in this case should be upheld is admirably set forth in the decision of the board in this case, and we quote it:

In our judgment the provision for fans is broad enough to and intended to include fans of every description. It would seem to be a matter of common knowledge that a very large class of fans, embracing perhaps the greater amount of merchandise of that character, is embroidered and that to hold, therefore, that this phrase did not include such would, in effect, except therefrom the greater number of imported articles of that kind. Moreover, the latter part of paragraph 427 conduces to the same conclusion, for by the paragraph itself is excepted palm-leaf fans. Upon a familiar principle of construction the enumeration of the exceptions from this paragraph includes *ex industria* all the articles which Congress intended should be excepted therefrom. Palm-leaf fans, therefore, being expressly excepted from the provisions

of the paragraph, the natural and legal inference is that palm-leaf fans alone are the only fans intended by Congress to be excepted therefrom. This exception does not carry with it embroidered fans, but, by the principle of construction suggested, leaves them included within the very broad term "fans of all kinds."

This conclusion seems to us to comply with the rule that full effect shall, when possible, be given to all parts of a statute. Under this interpretation the terms of the proviso of paragraph 339 may be applied when found to be more specific than those of a competing paragraph, the somewhat apparent inconsistency for which the Government contends of disregarding the well settled rule that the more specific designation shall control is thereby avoided, paragraph 427 is given what would seem to be its natural construction and effect, and opportunity still remains for application to be given to the terms of the proviso outside of the subjects enumerated in the paragraph of which it is a part. That it already has been given such application appears from the cases which the Government cites in support of its contention that such effect should be given it.

We recognize that the question involved in this case can not be said to be entirely free from doubt, but resolve whatever doubt exists in favor of the importers. That we should do this is settled law. *American Net & Twine Co. v. Worthington* (141 U. S., 468).

The judgment of the Circuit Court for the Northern District of California is *affirmed*.

DE VRIES, Judge, did not sit at the hearing or participate in the decision.

CARSON v. UNITED STATES (No. 512).¹

LEATHER GLOVES EMBROIDERED WITH MORE THAN THREE SINGLE STRANDS.

The board found in effect that the testimony and the samples failed to show that the gloves of this importation were not stitched or embroidered with more than three single strands or cords and that they were accordingly subject to the accumulated duties provided for in paragraph 459, tariff act of 1909. To warrant a reversal of this finding it must appear to be wholly without evidence to support it, or that it is clearly contrary to the weight of evidence as offered. Applying this rule, irrespective of any opinion proper on the merits or on a review of the authorities, the testimony and exhibits afford no such warrant, and the board is affirmed.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24000 (T. D. 30944).

[Affirmed.]

Lester C. Childs for appellant.

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue here is the classification of certain leather gloves under the tariff act of August 5, 1909, and the only question is whether they

¹ Reported in T. D. 31656 (20 Treas. Dec., 1150).

are subject to the cumulative duties provided in paragraph 459 of the act, which reads as follows:

459. In addition to the foregoing rates there shall be paid the following cumulative duties: On all leather gloves, when lined, one dollar per dozen pairs; on all pique or prix seam gloves, forty cents per dozen pairs; on all gloves stitched or embroidered, with more than three single strands or cords, forty cents per dozen pairs.

The merchandise was assessed thereunder by the collector, whose action was sustained by the Board of General Appraisers. We quote the decision of the board:

McClelland, General Appraiser: These protests involve the classification of certain leather gloves under the tariff act of 1909. The claim is that the gloves are not stitched or embroidered with more than three single strands or cords and therefore that the cumulative duty of 40 cents per dozen pairs should not have been assessed under paragraph 459 of said act.

From an examination of the record and samples of the gloves in question we find that duty was properly assessed and overrule the protests, the decision of the collector being affirmed in each case.

The record shows that two witnesses were improved by the appellants and that none were called on behalf of the United States.

We insert here the substance of their testimony. The first witness said that the three samples which he produced correctly represented the merchandise involved; that he was familiar with the different processes of embroidery and stitching and that there appeared on the outside of the back of each sample six chains of embroidery and on the inside six single rows of stitching; that he meant by six chains of embroidery on the outside, six rows. He was then asked:

Q. I notice on the back of this glove, which is Exhibit 2, there are twelve rows of stitching and three cords. What do you mean by six chains of embroidery?—A. I mean that what you call a cord, the raised part, is one thread, and the other one thread. I make those two threads. The outside is a continued thread right around making two, four, six.

Q. What you call the raised part of the glove is just the leather itself forming a ridge?—A. Sometimes call it a cord.

Q. On each side of each cord are two rows of stitching, aren't there?—A. Yes, sir.

Q. Those two rows completely encircle the cord?—A. Yes, sir.

Q. Is not that in itself known as a point?—A. The whole thing is known as a point.

Q. On each point you maintain there are two chains of embroidery?—A. Two chains of stitching.

Q. Why aren't there four chains?—A. There are two.

Q. But there are four rows?—A. One continued chain right around.

Q. The reason you call it two chains instead of four is because the four rows are made up of two single strands of thread?—A. Yes, sir.

Q. That is true of all the gloves?—A. Yes, that follows, too, on all the exhibits.

Q. Then on the inside, where there are ten distinct rows of stitching, you come to the conclusion that there are six rows for the same reason you have just stated, that one complete circle is made by one strand?—A. By one strand.

Q. So that the ornamentation, as far as the stitching is concerned, was made up with six threads?—A. To make the entire glove.

Q. The ornamentation?—A. The ornamentation.

Q. And the cords themselves are extra—how are they produced?—A. No, the cords are included. The cords are included. The cord is one thread and the stitching is one thread, which makes two threads—two, four, six altogether.

Q. Are the four rows around each cord made with one thread?—A. Two rows made with one thread. Just one right around. Might go around a dozen times, but one thread just the same.

Q. So in each instance where there appear four parallel rows that is done with one thread?—A. One thread.

Q. Then three threads made twelve parallel rows and three more threads made the three cords?—A. Yes, sir.

Q. That is true in each of the gloves?—A. Yes, sir.

The other witness testified that he was experienced in and familiar with the making of gloves. He was shown Exhibit 2 and asked:

Q. * * * State how many chains of embroidery are on the outside of the back of that glove?—A. That depends on what you mean by chains.

Q. What do you mean by chains?—A. I would call every one of those rows extending from side to side, from end to end, a continuous thread that is not broken.

Q. That is your idea of the word "chain"?—A. Yes, sir.

Q. With that idea, how many chains are on the back of that glove?—A. Three.

Q. How many on the inside?—A. Well, you mean of the total number there? I was taking one point there. It would be nine.

Q. How many on the inside?—A. The same number.

Q. * * * How many chains of embroidery appear on the back of that glove [Exhibit 3]?—A. Nine.

Q. On the inside?—A. The same.

He then testified that Exhibit 1 had the same thing on the inside and outside.

The attention of both witnesses was also called to what is referred to in the record as "the official sample in protest 368919" and each gave testimony relating thereto. We do not consider this evidence for two reasons: First, the record shows that the counsel for importers said that "protest 368919 is submitted on the official sample"; second, the decision of the Board of General Appraisers does not appear to refer thereto and the appellants' assignment of errors, which specifically sets forth the numbers of the protests to which it relates, does not include number 368919.

The substance of the appellants' contention is that the issue here is identical with that involved in *United States v. La Fetra* (178 Fed. Rep., 1006). This was a decision of the Circuit Court of Appeals sustaining the decision of the Circuit Court, which is found in 172 Federal Reporter, 297, where the Circuit Court sustained the decision of the Board of General Appraisers reported in T. D. 28966, in which case the board reversed the action of the collector.

The United States admits in its brief that "if the case turned only on the question of identity between the gloves in suit and the gloves passed on in the *La Fetra* case the position of the appellants would be difficult to challenge," and claims that the facts before us distinguish it from that case.

The cases above referred to involved the interpretation of paragraph 445 of the tariff act of 1897, which is identical in language with paragraph 459 of the act of 1909.

From the decision of the board in the La Fetra case we learn that—

The style of embroidery in issue is illustrated by Exhibits A, B, and C, which show three points each, each point having three distinct rows of stitching. Such stitching shows nine easily distinguishable chains of embroidery on the outside of the backs of the gloves and nine single rows of stitching on the inside of the backs thereof.

Judge Platt, in the Circuit Court, in affirming the decision of the board, said in substance that gloves exactly like those involved had been passed upon in that court in *Trefousse et al. v. United States*, and were found not to be subject to the cumulative duty provided in said paragraph 445. He further indicated that the Government had undertaken to show that the gloves in the La Fetra case were uniformly, commonly, and generally known in the trade as being "stitched or embroidered with more than three single strands or cords," and had failed in this contention, and for that reason, applying the principles of the *Trefousse* decision, he sustained the board.

By referring to the *Trefousse* case, the opinion in which was also written by Judge Platt, it appears that the Board of General Appraisers had sustained the assessment for cumulative duty on certain gloves in said paragraph 445, and referring to the decision of the board Judge Platt said:

They followed a rule which they had adopted in *G. A. 5595* (T. D. 25038), for the ascertainment of the number of strands or cords upon a glove, and found that by some peculiar method of reasoning, there were more than three single strands upon the gloves in question. It appears, however, that the same board, in *G. A. 4241* (T. D. 19945), held that certain leather gloves, having upon them embroidery in three rows, but showing on the backs of the gloves that each row presented the appearance of three-plait crochet work, the effect being produced by the needle with only one cord or strand of thread, as is shown by the stitching through and on the inside of the glove, were in fact not stitched or embroidered with more than three single strands or cords. This decision, upon appeal, was affirmed by Judge Wheeler, in *United States v. Robinson* (C. C.) (124 Fed. Rep., 1013), and has been acquiesced in by the Government. It would seem that the Board of General Appraisers in such a matter as this, when the gloves in respect of the manner of stitching are manifestly the same as those considered in *G. A. 4241*, ought to have followed the very clearly expressed and well-defined rule governing the provision found in paragraph 445.

In the La Fetra case the Circuit Court of Appeals in a *per curiam* opinion said:

If this were a case of novel impression, more weight might be given to the argument advanced by the Government in support of its contention as to the meaning of the words "single strand." But the question has been several times before the courts, and it appears from examination of the samples X and Y that goods identically like the present importations were before this court when the decision of the Circuit Court in *Trefousse v. United States* (144 Fed. Rep., 708) was affirmed several years ago. (154 Fed. Rep., 1005; 83 C. C. A., 679.) A great deal of testimony has been taken in this case as to commercial designation, but it is so conflicting that we agree with the Circuit Court in the conclusion that it is impossible to deduce therefrom any semblance of uniformity.

It will be observed, therefore, that in the La Fetra case both the Circuit Court and the Circuit Court of Appeals held in effect that gloves embroidered in three rows but showing on the backs of the gloves that each row presented the appearance of a 3-plait crochet work, the effect being produced by the needle with only one cord or strand of thread,

as is shown by the stitching through and on the inside of the glove, were in fact not stitched or embroidered with more than three single strands or cords within the meaning of said paragraph 445.

If we assume that this be the correct interpretation of paragraph 459 of the act of 1909, the question is whether the gloves involved here are within that description, as before stated. The arguments upon each side before us proceed upon the theory that if the facts are the same the *La Petra* case is controlling.

By their decision the board has in effect found that the testimony and the samples fail to establish that these gloves are not stitched or embroidered with more than three single strands or cords.

In order to warrant a reversal of the board, we must be satisfied that its finding is wholly without evidence to support it or that it is clearly contrary to the weight of evidence. *United States v. Riebe* (1 Ct. Cust. Appls., 19; T. D. 30776); *Holbrook v. United States* (1 Ct. Cust. Appls., 263; T. D. 31317).

Applying this rule, whatever may be our opinion upon the merits of this case or the controlling effect of the decisions to which we are cited, we are nevertheless constrained to say that we are unable from the testimony and the exhibits to find sufficient warrant to say that the judgment of the Board of General Appraisers ought to be reversed, and it is therefore *affirmed*.

SHELDON v. UNITED STATES (No. 522).¹

1. "SHEARS" DEFINED.

The definition of "shears" in Knight's American Mechanical Dictionary is accepted as correct: A cutting instrument operating like scissors, but on a larger scale and somewhat differently shaped; the edges of the blades are beveled and the handles adapted for thumb and fingers, respectively, instead of being duplicates.

2. HAIR CLIPPERS WITH ROTARY KNIVES NOT SHEARS.

A tool supplied with rotating or reciprocating knives or cutters arranged for clipping the hair short or close is not to be deemed scissors or shears, but is a manufacture of steel not specially provided for, and the importation was properly assessed under paragraph 199, tariff act of 1909.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24074 (T. D. 31004).

[Affirmed.]

Curie, Smith & Maxwell (W. Wickham Smith of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The only issue here is one of law. The articles involved are designated in the respective briefs as follows:

By the appellants as—

Certain hair clippers or clipping shears of the kind ordinarily used by barbers in cutting hair.

¹ Reported in T. D. 31657 (20 Treas. Dec., 1163).

By the appellee as—

Clippers for hair and beard.

They are used by barbers for clipping hair and beard. The board in substance described the article as a tool supplied with rotating or reciprocating knives or cutters so arranged as to allow the hair to be clipped close or short. No exhibit is before us and no testimony was taken before the board. The importation was assessed for duty by the collector at 45 per cent ad valorem as "manufactures of steel, not specially provided for" under paragraph 199 of the act of August 5, 1909.

The appellants contend that the articles are shears and dutiable at the rate of 75 cents per dozen, under paragraph 152 of the same act, as scissors or shears valued at over \$1.75 per dozen. The Board of General Appraisers sustained the collectors' classification and assessment.

The only question before us is whether these articles are shears, because if not they were clearly correctly assessed by the collector. The appellants at the outset concede that there is no question of commercial designation. The board, from a description of the merchandise given in the record, no sample being before it, considered that the articles were not for tariff purposes included in the provision for scissors and shears in paragraph 152.

The claim of the appellants is that within the common and ordinary understanding of the meaning of the word "shears" the articles here in controversy are shears and should be so treated for duty purposes, while the Government's contention is that the common meaning of the word, especially in the expression "scissors and shears" as it appears in the statute, does not include the articles in question.

As an aid in determining what is the ordinary and common meaning of the word "shears" we insert here its meaning as found in various dictionaries.

Standard Dictionary:

Any large cutting or clipping instrument worked by the crossing of cutting edges. Specifically: (1). An instrument in which two or more blades are made to cross by compressing a spring joint; as, sheep shears; clipping shears. (2). A large pair of scissors; specifically, in trade usage, a pair exceeding six inches in length.

Century Dictionary:

A cutting or clipping instrument consisting of two pivoted blades with beveled edges facing each other, such as is used for cutting cloth, or of a single piece of steel bent round until the blades meet, the elasticity of the back causing the blades to spring open when the pressure used in cutting has ceased. The latter is the kind used by farriers, sheep-shearers, weavers, etc. Shears of the first kind differ from scissors chiefly in being larger. Implements of similar form used for cutting metal are also called shears.

Worcester's Dictionary:

An instrument to cut with, consisting of two blades, usually moving on a pin, between which the thing to be cut, is interposed; a kind of large scissors.

Webster's International Dictionary:

Any of various cutting instruments operating by the action of opposed edges of metal.

Knight's American Mechanical Dictionary:

A cutting instrument, operating like scissors, but on a larger scale and somewhat differently shaped. The edges of the blades are beveled, and the handles adapted for thumb and fingers respectively, instead of being duplicates. They are used for tailors' use.

In various of the dictionaries there will be found more specific definitions of shears having relation to the purpose which they serve, such as tinman's shears, various kinds of bench shears, bar and metal shears, hydraulic shears, and others, and some of the definitions, one of which is embodied in the appellants' brief, as taken from Webster, include "A machine which cuts by means of a blade or set of blades working against a resisting edge, the material to be sheared being between the two."

These more specific definitions, we think, are not the kind of shears that Congress had in mind by the use of the words "scissors and shears" in paragraph 152. If the term "shears" be given the meaning claimed by the appellants, we see no reason why a large number of different tools used for the cutting of various articles, and never in common speech referred to as shears, might not, equally with the hair clippers involved in this case, be entitled to entry as shears. While in a sense the hair clippers involved in this case are, mechanically speaking, shears, yet the word "clippers" has a meaning of its own in the language. To illustrate, the Standard Dictionary defines clippers as, "An instrument for clipping hair, especially of horses"; the Century Dictionary as, "A cutting tool of the nature of shears; specifically, a tool with rotating or reciprocating knives used for cutting hair, and especially for clipping horses"; Knight's American Mechanical Dictionary as, "A machine for clipping hair; * * * one form has a stationary knife and several spiral knives on an axis, acting against the edge of the former. * * * A more usual form has a serrated knife reciprocating shearwise, with a similar plate, stationary or also reciprocating."

We are entirely clear that the word "shears" in the paragraph under consideration is not used in these special or mechanical senses. The common understanding of the word "shears" is admirably expressed in the quotation above, taken from Knight's American Mechanical Dictionary, as—

A cutting instrument operating like scissors, but on a larger scale and somewhat differently shaped. The edges of the blades are beveled, and the handles adapted for thumb and fingers, respectively, instead of being duplicates.

We think the term "barbers' hair clippers" or "clippers" in common understanding has come to have as fixed a meaning in the

English language, although perhaps not yet so generally used, because the clippers are not of so common use, as have the words "scissors" or "shears," and while it might be technically correct to order these hair clippers as clipping shears or shears, nevertheless we doubt if an order for shears of any given size were made without accompanying language suggesting that these tools with rotating or reciprocating knives or cutters were what was desired, such order would be filled by sending hair clippers like those involved here, while an order for hair clippers would undoubtedly be readily understood to mean articles similar or like those in question.

The conclusion we reach is that the word "shears" as used in paragraph 152 does not include such articles as the hair clippers involved in this case, and we do not therefore consider or determine the further contention of the Government made in the concluding part of its brief and argument that the protest is insufficient.

The judgment of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, did not sit at the hearing or participate in the decision.

GOODMAN *et al.* v. UNITED STATES (No. 525).¹

MANUFACTURED FEATHER ARTICLES, WINGS, POMPONS, ETC.

The importation consisted of feathers, technically distinguished as quills and plumage, and they were manufactured as trimmings for women's hats. They might be appropriately described as either quills or feathers. It must, however, be presumed that paragraph 438, tariff act of 1909, was enacted in view of the construction that had been theretofore placed on a like clause in a previous tariff act, and articles such as make up the importation will accordingly be held to be included by intention as feathers under that paragraph and to be dutiable as such; and this the more certainly since the articles enumerated along with quills in paragraph 463 of the law do not point to their probable use in making up women's hats or bonnets.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7120 (T. D. 31027).

[Affirmed.]

Joseph G. Kammerlohr (*John Giblon Duffy* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question in this case consists of certain manufactured feather articles known as "wings," "pompons," "sweeps,"

¹ Reported in T. D. 31658 (20 Treas. Dec., 1166).

etc. The articles as imported were entered to be applied as trimmings of women's hats, and were expressly manufactured for that purpose. They consist of feathers taken from the wings, tails, and other parts of birds, and are technically distinguished as quills and plumage.

The appraiser returned all of the articles as "ornamental feathers, manufactured feathers chief value." Duty was assessed thereon at 60 per cent under paragraph 438 of the tariff act of 1909, which paragraph reads as follows:

438. Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this section, twenty per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, including quilts of down and other manufactures of down, and also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, sixty per centum ad valorem; boas, boutonnieres, wreaths, and all articles not specially provided for in this section, composed wholly or in chief value of any of the feathers, flowers, leaves, or other materials or articles herein mentioned, sixty per centum ad valorem.

The importers protested against such classification, and rely upon the provision of paragraph 463 of said act, which reads as follows:

463. Manufactures of bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component material of chief value, not specially provided for in this section, thirty-five per centum ad valorem; but the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separate fiber thereof; sponges made of rubber, forty per centum ad valorem; combs, composed wholly of horn, or composed of horn and metal, fifty per centum ad valorem.

Testimony was introduced upon the subject of the commercial meaning of the word "quills," but the testimony need not be recited at length, as we think the case resolves itself into a single question, and that one of law.

It is established, not only by the testimony but by the lexicographers, that the tail and wing feathers of a bird are appropriately described as quills. They are also described as feathers. So that it may be said that in the absence of other provisions of the statute the article in question might be classified, so far as it is composed of tail and wing feathers of a bird, as either quills or feathers. The testimony of the importer shows to our satisfaction that these articles are composed in chief value of the quill feathers. So we are left to a consideration of the question of which paragraph of this statute should control.

This question is one of some difficulty. Taking up the first section and its history, the argument is most persuasive that Congress intended by paragraph 438 to cover such merchandise as is here involved. The previous tariff act of 1897 containing the identical language of paragraph 438, excepting the concluding portion, which reads, "boas, boutonnieres, wreaths, and all articles not specially provided for in this section, composed wholly or in chief value of any of the feathers, flowers, leaves, or other materials or articles herein mentioned, sixty per centum ad valorem." Under the law as it previously existed, it was held by the Board of General Appraisers (T. D. 27888) and on appeal by the United States Circuit Court and Circuit Court of Appeals, in *United States v. Berlinger* (167 Fed. Rep., 800; T. D. 29577), that manufactures of feathers were not dutiable as feathers under the provisions of the act as it then stood, and that where metal was employed in the manufacture of such articles as are here under consideration, they were properly subject to duty under paragraph 193 of the act of 1897 as articles composed in part of metal.

With this interpretation of the former statute before it, the inference is very strong that Congress intended by the addition to paragraph 438 of the language above quoted to remove any doubt as to whether the articles should be assessed under the metal paragraph, and to bring them within paragraph 438. This conclusion would be irresistible if it were not for the contention which is made that the article in question is more specifically described by paragraph 463. The argument is this, that the word "quills" had a previous judicial interpretation in a case arising under paragraph 600 of the tariff act of 1894, in which quills appeared on the free list. It is true that in the case of *United States v. Stearns* (79 Fed. Rep., 953), it was held that the strong wing and tail feathers of a turkey are in ordinary speech known as quills and fall within the definition given in the various dictionaries, and that as paragraph 600 did not contain the qualifying words "not specially provided for," while paragraph 443 did contain said provision, the importation there in question should be admitted free.

On the other hand, it has also been held that the wing and tail feathers of certain birds are dutiable as feathers. See *G. A. 1328* (T. D. 12832) and *G. A. 1470* (T. D. 12919). So that Congress had before it a judicial construction of the word "quills" and also a judicial construction of the word "feathers," holding that articles such as those in question were appropriately classifiable as feathers. In other words, while quills had been held to include the wing and tail feathers of birds, it had also been held that they were appropriately described as feathers, and hence would

be clearly within the term "feathers of all kinds" as used in paragraph 438.

Both counsel invoke the rule that if the legislature uses words which have received a judicial interpretation, they are presumed to be used in that sense unless the contrary intent can be gathered from the statute. This is unquestionably a general rule. It is somewhat lessened, however, where the same language is no preserved, but is substantially varied. (2 Lewis's Sutherland Statutory Construction, sec. 399.)

In the present case it is to be noted that the words interpreted by the decision of the court in *United States v. Stearns*, *supra*, were "quills prepared." In the present act the legislation relates to "manufactures of quills," and from the connection in which the word is employed it might well relate to quills in a different sense. Paragraph 463 deals with "bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component material of chief value, not specially provided for in this section." There is nothing provided for in this section which suggests manufactures to be used as articles of millinery or in the making up of hats or bonnets, whereas under paragraph 438 the articles there provided for are those used in making and ornamenting millinery, such as hats and the like. We think the intent of Congress was to include in paragraph 438 all articles of this class, and that as the language employed by the added portion of the section is appropriate for this purpose, it should be given that construction.

While the word "quills" is appropriate to describe the wing and tail feathers of a bird, yet this is not its sole use. It is given definitions by the lexicographers much narrower in scope, as for instance: In the *Standard Dictionary*, the third definition of quills is given as—

The hollow, horny, basal part or stem of a feather; a tube; barrel; calamus.

And in the *Century Dictionary*, the sixth definition is—

The hard, hollow, horny part of the scape of any feather, which does not bear barbs, and by which the feather is inserted in the skin; the calamus as distinguished from the rachis.

It will be noted that if this definition be applied to the word "quills" it designates an article of the same general character as those with which it is placed in connection in paragraph 463, and this leads to the conclusion that it was in this sense that Congress employed the word in that section.

The result reached by the Board of General Appraisers was the correct one, and the decision is *affirmed*.

UNITED STATES *v.* FRANKLIN SUGAR REFINING CO. (No. 528).¹

1. WEIGHT OF IMPORTED SUGAR.

A change in the weight of imported sugar resulting from natural evaporation only is not a change in its condition by "remanufacture or otherwise."

2. COUNTERVAILING DUTY ON SUGAR, TARIFF ACT OF 1897.

The Secretary of the Treasury was empowered by law to make all needful regulations for the assessment and collection of a countervailing duty imposed by the tariff act of 1897 on sugar imported into this country from a country where a bounty had been paid and regardless of any possible change in the weight on a consignment of sugar from Germany after its importation, the established regulations of the Treasury Department then in force controlled the shipment, and the countervailing duty, accordingly, was properly assessed on the actual or landed weight.

United States Court of Customs Appeals, May 29, 1911.

TRANSFERRED from United States Circuit Court for Eastern District of Pennsylvania,
Abstract 14351 (T. D. 27892).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker*, on the brief),
for the United States.

James Wilson Bayard and *John G. Johnson* for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The appellee imported into this country at the port of Philadelphia numerous cargoes of raw sugar which had been produced in Germany. The shipments in question in this case commenced in the year 1898 and continued until 1904; the issues in the case are therefore controlled by the tariff act of 1897.

Paragraph 209 of that act imposed a certain duty upon such importations, and the duty provided by that paragraph was liquidated and paid without controversy.

In addition to the duty levied by the above paragraph, the importations became liable to a countervailing duty under the terms of section 5 of the same act. That section provided that whenever any country should pay a bounty upon the exportation of any merchandise from such country and such merchandise was dutiable under the provisions of the tariff act, there should be levied upon such merchandise upon its importation into this country an additional duty equal to the net amount of such bounty, and that the net amount of such export bounties should from time to time be ascertained, determined, and declared by the Secretary of the Treasury, who should make all needful regulations for the identification of such merchandise and for the assessment and collection of such additional duties.

During the time covered by the shipments in question the German Government paid a bounty upon the exportation of such sugar from that country, and the Secretary of the Treasury ascertained and declared the net amount of such bounty to be 2.50 marks per 100

¹ Reported in T. D. 31659 (20 Treas. Dec., 1170).

kilograms up to June 20, 1899, and 2.40 marks per 100 kilograms after that time. The importations in this case therefore became liable to additional duties at that rate.

The collector liquidated these duties by adopting the invoice or export weight of each cargo and computing the duty thereon at the rate of 2.50 or 2.40 marks per 100 kilograms. The importer protested and contended that the actual or landed weight of the sugar at importation should be taken as the basis of calculation and the duty ascertained by computing the proper rate upon each 100 kilograms thereof.

It is claimed by the Government that the actual or landed weight of a cargo of raw sugar when it reaches this country is about 1 per cent less on the average than the invoice weight, which is the weight at exportation. This is said to be the ordinary decrease in weight of a cargo from evaporation alone without considering any other kind of loss. It is obvious that such diminution would vary somewhat in different cargoes because of differing conditions. The importations at bar, however, seemed to follow the supposed rule.

The protest of the importer was heard, without the taking of evidence, by the Board of General Appraisers, and the collector was reversed. The Government appealed to the United States Circuit Court, Eastern District of Pennsylvania, where the testimony of witnesses was taken on the application of the Government over the objection and exception of the importer. Before judgment in that court the case was duly transferred to this court, and the appellant now prays for a reversal of the board's decision.

As appears from the foregoing statement, this case does not involve the duties imposed by paragraph 209, but only those provided by section 5; nevertheless both sections are here copied in full:

209. Sugars not above number sixteen Dutch standard in color, tank bottoms, sirups of cane juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, ninety-five one-hundredths of one cent per pound, and for every additional degree shown by the polariscopic test, thirty-five one-thousandths of one cent per pound additional, and fractions of a degree in proportion; and on sugar above number sixteen Dutch standard in color; and on all sugar which has gone through a process of refining, one cent and ninety-five one-hundredths of one cent per pound; molasses testing above forty degrees and not above fifty-six degrees, three cents per gallon; testing fifty-six degrees and above, six cents per gallon; sugar drainings and sugar sweepings shall be subject to duty as molasses or sugar, as the case may be, according to polariscopic test: *Provided*, That nothing herein contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the King of the Hawaiian Islands on the thirtieth day of January, eighteen hundred and seventy-five, or the provisions of any Act of Congress heretofore passed for the execution of the same.

5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise

is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

It will be noted that section 5 provided that whenever any country should pay a bounty upon the exportation of any merchandise from such country and such merchandise was dutiable under the act, then upon importation of such merchandise into this country it should be liable to an additional duty equal to the net amount of such bounty, and that the Secretary of the Treasury should from time to time ascertain, determine, and declare the net export bounties referred to in the section and should make all needful regulations for the identification of such merchandise and for the assessment and collection of such additional duties. In the performance of the duty thus imposed upon him that officer issued a number of declarations and departmental regulations in relation to such importations. These are given below:

(T. D. 18217.)

Export bounties paid by foreign countries on exportation of sugar.

TREASURY DEPARTMENT, July 31, 1897.

GENTLEMEN: In reply to your letter of the 27th instant, I have to inform you that this department has not yet received the necessary data for the declaration contemplated by section 5 of the tariff act of July 24, 1897, in regard to export bounties paid by various foreign countries.

From information collected under the former tariffs, in regard to foreign bounties on the export of sugar, it appears that Germany, Austria, the Argentine Republic, and France pay the following bounties:

GERMANY.

1. On raw sugar at least 90 per cent polarization and on refined sugar under 98 per cent and at least 90 per cent, 2.50 marks per 100 kilos.
2. On candy and sugar in white, hard loaves, blocks, etc., at least 99½ per cent, 3.55 marks per 100 kilos.
3. On all other sugar at least 98 per cent, 3 marks per 100 kilos.

* * * * *

Respectfully, yours, .

W. B. HOWELL, *Assistant Secretary.*

Messrs. ROGERS, HOLLOWAY & Co.,
Philadelphia, Pa.

(T. D. 20407.)

Additional duties on sugar imported from, or the product of, countries paying bounties on the export thereof.

[Circular No. 199.]

TREASURY DEPARTMENT, December 12, 1898.

To officers of the customs and others concerned:

Section 5 of the act of July 24, 1897, provides as follows: [Here follows section 5.]

In pursuance of these provisions, the following amounts of bounties respectively or bestowed, directly or indirectly, on the export of sugars by the countries here

inafter named are hereby declared for the assessment of additional duties on sugars imported from, or the product of, such countries or their dependencies, viz:

* * * * *

GERMANY.

1. On raw sugar at least 90 per cent polarizarion and on refined sugar under 98 per cent and at least 90 per cent, 2.50 marks per 100 kilograms.

2. On candy and sugar in white, hard leaves, blocks, crystals, etc., at least 99½ per cent, 3.55 marks per 100 kilograms.

3. On all other sugar at least 98 per cent, 3 marks per 100 kilograms.

* * * * *

Every invoice of sugar must be accompanied by a certificate of the United States consular officer at the port of shipment to the United States, naming place and country where the merchandise was produced, and, in the case of refined sugar, naming also the country of production of the raw sugar, molasses, or sirup used in the refining.

The liquidation of entries of sugar not accompanied by such certificates shall be suspended, and the estimated duties shall include an amount sufficient to cover the additional duty to which such sugar may be apparently liable.

The conversion of the several foreign currencies mentioned above into United States money will be governed by the provisions of section 25 of the act of August 28, 1894.

* * * * *

L. J. GAGE, *Secretary*.

(T. D. 21274.)

Export bounty on German raw sugar.

[Circular No. 86.]

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., June 20, 1899.

To officers of the customs and others concerned:

The net amount of the bounty paid by Germany on the export of raw sugar testing at least 90 per cent, as ascertained and determined under the provisions of section 5 of the act of July 24, 1897, is hereby declared as 2.40 marks per 100 kilograms for the assessment of additional duty under said law.

L. J. GAGE, *Secretary*.

(T. D. 21333.)

Sugar bounty.

Provisions of Circular No. 86 (S. 21274) regarding export bounty on German raw sugar applicable only to sugars shipped to United States on or after date of circular, June 20, 1899.

TREASURY DEPARTMENT, June 30, 1899.

SIR: In reply to the letter from your office, dated the 27th instant, I have to inform you that, in accordance with the established practice, the provisions of department's Circular No. 86 of June 20, 1899 (S. 21274), relative to export bounty on German raw sugar, are applicable only to sugars shipped to the United States on or after the date of the circular, previous shipments to remain subject to the provisions of similar circulars upon the subject in force at the time of each shipment.

Respectfully, yours,

O. L. SPAULDING, *Assistant Secretary*.

COLLECTOR OF CUSTOMS, New York, N. Y.

It appears, therefore, beyond controversy that the sugar in question, being exported from Germany and being of the requisite grade, had been paid an export bounty at the rate named in the declaration,

and was to be assessed at that rate for the countervailing duty provided by section 5. And the sole question upon the merits in this case is, whether from the law and the declarations and regulations made pursuant thereto, as above copied, the countervailing duty was to be determined by applying the conceded rates to the invoice or export weight of the cargoes on the one hand or to their actual or landed weight upon arrival on the other hand.

There was no testimony taken concerning the existence or amount of the German export bounty upon raw sugar during the time in question. All that appears in the record upon that subject is contained in the published declarations and regulations issued in 1898 and 1899 in conformity with the law. As appears above, these publications stated that the German Government paid an export bounty upon all raw sugar testing at least 90 per cent, and that the net amount of the bounty was 2.50 marks per 100 kilograms during part of the period in question, and 2.40 marks per 100 kilograms during the remainder thereof, and declared those rates "for the assessment of additional duties on sugars imported from or the product of" that country.

These regulations do not specifically state whether the assessment at the given rate should be computed upon the export or import weights of the cargoes, and this fact of itself seems to indicate that the import weight is the proper basis for such a computation. The rule is that all general provisions of the statute or general regulations of the department providing for the collection of duties at a certain rate to be computed upon the merchandise by number, volume or weight, refer to the importations as they arrive in this country. If a different meaning is intended in any case it should be stated with the distinctness proper for an exception to the rule.

The direct or primary duty prescribed by paragraph 209 above copied was concededly assessable upon the weight of the sugar at importation without regard to the weight at exportation. And section 5 also provided that in case of the payment of export bounties by a foreign Government upon any merchandise which was dutiable under our tariff law, "*then upon the importation of any such article or merchandise into the United States,*" the additional or countervailing duty should be imposed.

Whenever the actual weight of merchandise upon arrival is found to be greater than the invoice weight such actual weight should be and would be taken as the basis for the computation of duties assessable according to weight. And if the actual weight is the lesser one it should nevertheless be adopted. The same rule would also seem to be intended in the case of countervailing duties unless a contrary purpose is clearly made manifest in the law. If, for illustration, by some mischance a cargo of sugar absorbed moisture upon the voyage

and thus gained weight instead of losing it by evaporation, and nevertheless tested above the minimum degree, it should undoubtedly be assessed for the countervailing duty at such greater actual weight.

The Government contends that such an interpretation would not accomplish the object of the law. Congress obviously intended that the countervailing duty levied upon the importation should equal the net foreign bounty paid upon the exportation. It is contended that the export bounty must necessarily have been computed upon the export weight of the cargoes, and that if the countervailing duty should be assessed upon the import weight part of the bounty would be retained by the importer, because of the difference between the two. The Government does not contend that this complaint should apply to a case of actual loss of any part of the cargo from extraneous causes, but only to the ordinary shrinkage of weight from evaporation alone. It is argued that the evaporation simply reduced the moisture in the sugar, leaving the saccharine strength unimpaired, and that the actual value of the importation was not diminished by the loss of weight thus caused.

The testimony does not very clearly disclose how reliable these estimates may be. But all such facts and circumstances must have been considered by the Secretary in 1898 and 1899 when the regulations above copied were formulated. It was his function to ascertain from time to time the net amount of the export bounties paid upon such merchandise and to declare the same, and make all needful regulations for the identification of such merchandise and for the assessment and collection of such additional duties as would counterbalance the bounties. When he adopted a rate per 100 kilograms without specific provision that it should apply to any other than the import weight, he thereby practically held against the present claim of the Government and decided in effect that all things considered the duties and bounties would be most effectually equalized by computing the rate given by him upon the weight of the importations upon arrival.

It may be assumed that it was within his authority under the act to provide that the rate given by him should be computed upon the invoice weight, in case he found that method necessary to accomplish the purpose of the act.

We do not agree at all with the view that the duty could not have been assessed at the given rate upon the weight of the sugar at the time of exportation. That procedure would not have been taxing the property before its importation, but would have been taxing it at importation by a method of assessment in which its weight at exportation would simply have entered as a factor of computation. This would certainly have been within the authority conferred upon the Secretary in order to accomplish the purpose of the law. That

purpose undoubtedly was that the additional duty exacted here should equal the export bounty paid abroad. While the Secretary was given no power to alter or modify this purpose, he was given all power necessary to carry it into effect. However, he may have found upon investigation that the most practicable and effective method of accomplishing that purpose was by simply assessing upon the sugar upon arrival the same rate per 100 kilograms as was paid upon it at exportation, without attempting to differentiate because of the loss of weight by evaporation. There is nothing in the record which would show such a finding to be incorrect. The Government's claim that the total saccharine strength of the sugar was not at all impaired in this case by the loss of weight is not very reliably sustained by the record.

It will be observed also that the export bounty paid upon raw sugar by the German Government, according to the declaration of the Secretary, was a certain fixed rate upon each 100 kilograms testing at least 90°; there seems to have been no graduated scale of duty adjusted to different degrees of saccharine strength. So far as the declaration shows all raw sugar of that grade or more received the export bounty at the stated rate, and such raw sugar as fell below that degree did not receive that bounty. The regulation followed the declaration in terms and made no distinction between different degrees of strength above 90°, but simply provided that raw sugar testing at least 90° imported from Germany should pay additional duty at 2.50 marks or 2.40 marks per 100 kilograms. Apparently therefore the imported sugar as entered at port would have received no greater export bounty than the above-named rate computed upon its weight as it then was. It may be remarked again that the only statement made in the record concerning the German export bounty and its provisions is that made by the Secretary in the publication made pursuant to the section in the years 1898 and 1899. Nor does the court take judicial notice of the existence or amount of such foreign export bounties.

The view above indicated is strengthened by the history of the former litigation which occurred upon this same subject. In T. D. 23503, in a case arising upon precisely the same issue as this, the board held that the rate of 2.50 marks, or 2.40 marks, per 100 kilograms, should be computed upon the invoice weight of the cargoes, and not upon the landed weight. This decision was affirmed by the United States Circuit Court (137 Fed. Rep., 655), but both decisions were reversed by the United States Circuit Court of Appeals (142 Fed. Rep., 376). This latter decision, the opinion in which was written by Justice Gray, was announced on January 4, 1906. All the importations in the present case were made after that time and under the same act, and furthermore under the same declaration and regulations which existed at the time of the decided case. The fact

that no change was made in the regulations after the judgment in the above case implies an acquiescence in it.

It will be noted that section 5 provides that the bounty-paid merchandise should be subject to the countervailing duty whether such merchandise was imported in the same condition as when exported from the country of production or whether its condition had been changed by remanufacture or otherwise. This provision is commented upon in the briefs, but it does not seem to relate to the present issue. A change in the weight of the imported sugar, resulting from natural evaporation only, is not a change in its condition by "remanufacture or otherwise."

Upon the merits of the case the decision of the board should be affirmed, and therefore the several questions of procedure made in the case by appellee need not be considered.

The decision of the board is *affirmed*.

UNITED STATES v. SAUNDERS (No. 533):¹

"SIDES" AS APPLIED TO LUMBER.

There does not appear to be any definite, uniform, and general trade meaning of the word "sides" applied to lumber, but the change in the phraseology of paragraph 201, tariff act of 1909, seems to show it was intended to include within it all planed or sawed lumber without regard to its actual dimensions, when one, two, three, or four sides had been planed or finished; and so the importation of boards, varying from 1 to 1½ inches in thickness, was dutiable under that paragraph.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24274 (T. D. 31090.)

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Brown & Gerry for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

In the months of March and April, 1910, the appellee imported and entered at the port of Buffalo certain cargoes of spruce lumber. The lumber was composed of boards varying from 1 inch to 1½ inches in thickness.

The appraiser returned the same as "lumber planed on four sides," and upon that return the collector assessed duty according to the rates prescribed by paragraph 201 of the act of 1909, for lumber planed on four sides. The importer filed his protest to this ruling and contended that boards of the size in question could not have four sides, but only two sides and two edges, and that it was therefore erroneous to classify them as boards planed on four sides. This

¹ Reported in T. D. 31660 (20 Treas. Dec., 1177).

protest was heard on evidence by the Board of General Appraisers and the same was sustained. The Government now prays for a reversal of the board's decision.

Paragraph 201 of the act of 1909 reads as follows:

201. Sawed boards, planks, deals, and other lumber of whitewood, sycamore, and basswood, fifty cents per thousand feet board measure; sawed lumber, not specially provided for in this section, one dollar and twenty-five cents per thousand feet board measure; but when lumber of any sort is planed or finished, there shall be levied in addition to the rates herein provided, the following:

For one side so planed or finished, fifty cents per thousand feet board measure; for planing or finishing on one side and tonguing and grooving or for planing or finishing on two sides, seventy-five cents per thousand feet board measure; for planing or finishing on three sides, or planing and finishing on two sides and tonguing and grooving, one dollar and twelve and one-half cents per thousand feet board measure; for planing and finishing on four sides, one dollar and fifty cents per thousand feet board measure; and in estimating board measure under this schedule no deduction shall be made on board measure on account of planing, tonguing, and grooving.

It will be observed that this paragraph treats of different kinds of sawed lumber and imposes certain rates of duty upon the same; and that it furthermore provides for additional graduated duties upon such lumber of any sort if it be planed or finished severally upon one, two, three, or four sides. There is nothing in the paragraph which in terms limits the additional duties to lumber of any given thickness. On the contrary it is specifically provided that the additional duties shall be levied upon "lumber of any sort" which is planed or finished in the manner or to the extent stated. The proper construction of the paragraph, therefore, seems to be that any surface of a board which is actually planed or finished becomes thereby a side within the meaning of the paragraph. The paragraph deals with the labor put upon the board to bring it to an improved condition, and uses the word side to indicate the place upon which the labor is expended. In this view any surface which is broad enough to receive such labor and become so improved is broad enough to be called a side. And if a board is so treated on four surfaces it must have four sides within the meaning of the act.

If the narrow sides or so-called edges of a board are not to be considered as sides within the meaning of the paragraph, then both such edges may be planed and finished before importation and nevertheless no additional duty be imposed upon the boards because of such improved condition. This does not seem consistent with the purpose of the paragraph, which obviously seeks to increase the duty upon the boards in proportion to the labor expended upon them before importation.

The testimony contained in the record shows that the cost of planing the so-called edges is about the same as the planing of the broader sides. This tends to confirm the foregoing interpretation of the paragraph.

The testimony contained in the record does not prove the existence of any definite, uniform, and general trade meaning of the word

“sides” with sufficient force and clearness to control the construction of the paragraph.

Under the act of 1897 the Board of General Appraisers in T. D. 24996, in construing a provision for additional duties upon lumber according to the number of sides planed or finished, held that no additional assessment should be made upon boards because of the planing of their edges. The board in the cited case adopted the definition of the appellee and held that such boards have but two sides and two edges within the meaning of the act, and therefore can not be said to be planed on three sides or on four sides. However, in the controlling paragraph of that act there was no specific provision made in terms for the planing or finishing of three sides or of four sides of the sawed lumber; the provision was a general one, providing for an additional assessment for “each side so planed or finished.” But the corresponding paragraph in the act of 1909, being the paragraph now under review, changed this phraseology, and definitely provided for a separate levy in case one side, or two sides, or three sides, or four sides were planed or finished. And as above appears, this provision is in comprehensive terms, aptly applying to lumber of all kinds named in the preceding part of the paragraph. This change in the language of the paragraph seems to manifest a legislative purpose to apply the term “sides” to all surfaces of any piece of sawed lumber which are actually planed or finished.

The decision of the board is therefore *reversed*.

SHONINGER v. UNITED STATES (No. 563).¹

VEGETABLE FIBER, PARAGRAPH 349, TARIFF ACT OF 1909.

Cotton is a vegetable fiber, and merchandise composed of cotton net, if embroidered with a design in artificial silk, cotton being the component of chief value, falls for dutiable purposes within the last proviso of paragraph 349, tariff act of 1909, namely, that no article or fabric of any description composed of flax or other vegetable fiber, or of which these materials or any of them is the component of chief value, when embroidered shall pay a less duty than the duty there fixed.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7127 (T. D. 31087).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Thomas J. Doherty on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

This case relates to merchandise consisting of embroideries composed of cotton net embroidered with a design in artificial silk,

¹ Reported in T. D. 31661 (20 Treas. Dec., 1179).

cotton being the component material of chief value. The protest covered also certain other merchandise, but the other questions thus raised are no longer at issue between the parties.

The case is controlled by the tariff act of 1909. The collector assessed the importation at 45 cents per pound, and in addition thereto 60 per cent ad valorem, being the same rate as that provided for embroideries composed wholly or in chief value of artificial silk, under the concluding provision of paragraph 349, construed together with paragraph 405. The appellants protested against this ruling, and contended that the merchandise in question was dutiable at 60 per cent ad valorem under the provisions contained in the main body of paragraph 349. The protest was duly heard by the Board of General Appraisers, and was overruled. The appellants now pray for a reversal of the board's decision.

At the hearing before the board the parties dispensed with the production of witnesses and entered in the record a stipulation as to the facts, reciting that—

the merchandise in question consists of embroideries composed of cotton net embroidered with a design in artificial silk * * * and that cotton is the component material of chief value.

The issue depends upon the construction of paragraphs 349 and 405 of the act of 1909; they are therefore copied in full.

349. Laces, lace window curtains, and all other lace articles, handkerchiefs, napkins, wearing apparel, and all other articles made wholly or in part of lace or laces, or in imitation of lace; nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flutings, quillings, embroideries, trimmings, braids, featherstitch braids, edgings, insertings, flouncings, galloons, gorings, bands, bandings, belts, beltings, bindings, cords, ornaments, ribbons, tapes, webs, and webbings; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tambooured, appliquéed or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork; ornamented or embroidered in any manner herein described, in any part thereof, however small; hemstitched or tucked flouncings or skirtings; all of the foregoing composed wholly or in chief value of cotton, flax, or other vegetable fiber, or of cotton, flax, or other vegetable fiber and india rubber, or of cotton, flax, or other vegetable fiber, india rubber, and metal, and not elsewhere specially provided for in this section, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief value of one or more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the goods of which the same is composed: *And provided further*, That no article or fabric of any description, composed of flax or other vegetable fiber, or of which these materials or any of them is the component material of chief value, when embroidered by hand or machinery, or having hand or machinery embroidery thereon, shall pay a less rate of duty than that imposed in this section upon any embroideries of the materials of which such embroidery is composed.

405. Yarns, threads, filaments of artificial or imitation silk, or of artificial or imitation horsehair, by whatever name known, and by whatever process made, if in the form of singles, forty-five cents per pound; if in the form of tram, fifty cents per pound; if in the form of organzine, sixty cents per pound: *Provided*, That in no case shall any

yarns, threads, or filaments of artificial or imitation silk or imitation horsehair, or any yarns, threads, or filaments made from waste of such materials, pay a less rate of duty than thirty per centum ad valorem; braids, laces, embroideries, galloons, neck ruffings, ruchings, fringes, trimmings, beltings, cords, tassels, ribbons, or other articles or fabrics composed wholly or in chief value of yarns, threads, filaments, or fibers of artificial or imitation silk or of artificial or imitation horsehair, by whatever name known, and by whatever process made, forty-five cents per pound, and in addition thereto sixty per centum ad valorem.

As will be observed from the foregoing copies, paragraph 349 in its concluding sentence provides that no article or fabric of any description composed of flax or other vegetable fiber, or of which these materials or any of them is the component material of chief value, when embroidered, shall pay a less rate of duty than that imposed in the act upon any embroideries of the materials of which such embroidery is composed. This enactment is in the form of a proviso to the paragraph, but in its real force and effect it is an independent provision which by reference establishes a minimum rate of duty for the articles named within its descriptive terms. That minimum rate of duty is undoubtedly the same rate as that assessed by the collector upon the articles involved in this case. Therefore the only real question in the case is this: Are these goods covered by the description contained in the concluding clause of paragraph 349; that is, are they composed of "flax or other vegetable fiber"?

Of course the goods contain no flax; therefore the question is really limited to "vegetable fiber."

The article in question is composed in chief bulk and also in chief value of cotton, which is not only a vegetable fiber, but is in fact the best known and most important vegetable fiber in the world. Therefore the descriptive term "vegetable fiber" would clearly include the article at bar unless the natural and ordinary meaning of the term is to be limited and controlled by some other provisions of the act.

The appellants contend that a consideration of the entire paragraph in question discloses that Congress did not intend to include cotton within the class "vegetable fiber," as therein used, and that cotton is mentioned *eo nomine* or by direct reference in the paragraph whenever it is intended to be included. The body of paragraph 349 deals with many articles which have a general similarity to the merchandise in question, and in naming the component material thereof cotton is three times mentioned by name and once by unmistakable reference. The first mention of component materials in the paragraph reads "composed wholly or in chief value of cotton, flax, or other vegetable fiber"; the next one reads "or of cotton, flax, or other vegetable fiber, and india rubber"; the next reads "or of cotton, flax, or other vegetable fiber, india rubber and metal," and the first general reference to component materials is in the following language, "one or more of the materials or goods specified in this paragraph."

It may be noted again that the concluding provision of the paragraph, being the one under review, mentions as the component materials of the articles covered by it only "flax or other vegetable fiber." Appellants contend that the mention of cotton *eo nomine* in conjunction with "other vegetable fiber" in the body of the paragraph indicates a legislative purpose to use the term "vegetable fiber" as exclusive of cotton, and therefore that the term "vegetable fiber" in the concluding provision, used alone and without mention of cotton *eo nomine*, should be construed to mean vegetable fiber except cotton. The argument is that Congress would not have mentioned cotton *eo nomine* in conjunction with other vegetable fiber in the body of the paragraph unless it was intended to imply thereby that the term "vegetable fiber" as used in the paragraph did not *ex proprio vigore* include cotton.

This argument, however, is answered by several considerations. In the first place the term "vegetable fiber," in its ordinary and correct meaning, includes cotton, and there appears to be no substantial reason why Congress should have intended to use it here in any different sense. The argument of appellants depends wholly upon mere verbal construction. In the next place, whenever cotton is named in the paragraph it is named definitively as a vegetable fiber. It is not contradistinguished from vegetable fibers, but distinctly and in terms classified as one of them, the expression being "cotton or other vegetable fiber." This use gives to vegetable fiber a definition which includes rather than excludes cotton. The construction does not imply that cotton is a thing outside of or apart from vegetable fiber, which must therefore be mentioned specifically in order to be included, but rather that cotton is itself a vegetable fiber, and that wherever it is specifically named in the provision it is done out of mere abundance of caution and at the risk of tautology.

In the vermuth case cited by counsel for appellants a different construction presents itself. Vermuth was in a general sense a kind of wine, and yet in composition and use was peculiar, being an article somewhat of its own class. One of the paragraphs in the act of 1897 made provision for "still wines, including ginger wine or ginger cordial and vermuth," and also for "any wines, ginger cordial or vermuth," and also provided that no allowance should be made for "leakage or damage on wines, liquors, cordials, or distilled spirits." It was held that the latter provision did not cover leakage of vermuth, inasmuch as it was not included therein by name, and the paragraph by naming vermuth separately in the manner above appearing had not included it within the general terms "wines, liquors, cordials, or distilled spirits." In the reviewing court the decision was affirmed upon the additional grounds that vermuth was not known as wine, either commercially or popularly, and an earlier decision to that effect was cited.

In the present case cotton is undoubtedly a vegetable fiber and is indeed the one which is best known and most universally used, and the paragraph under review recognizes this by its repeated reference to "cotton or other vegetable fiber," and therefore we hold it to be included within the meaning of that term as used in the last clause of paragraph 349. In this view of the case the assessment was correct, and therefore the decision of the board is *affirmed*.

TILGE v. UNITED STATES (No. 577).¹

1. CONGRESSIONAL RECORD.

In the ascertainment of the intention of the Congress in giving final shape to a paragraph that had been a subject of contention with them, resort may be had to the current history of the times and of the particular piece of legislation in question. The Congressional Record officially preserves that history.—Aldridge *et al.* v. Williams (3 How., 8, 23).

2. SKIVERS NOT DUTIABLE AS SPLIT LEATHER.

Reviewing the legislative history of the proviso to paragraph 450, tariff act of 1909, it can not be held the Congress meant to extend its provisions to still other paragraphs—to paragraph 451, for example—and so "split leather," as employed in that proviso, does not include articles such as the skivers of the importation. These were properly held to be dutiable under paragraph 451; and as the duty would be the same it is unnecessary to determine their classification as between either "sheepskins dressed and finished" or as "other leather."

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7134 (T. D. 31131).

[Affirmed.]

Curie, Smith & Maxwell (W. Wickham Smith and Thomas M. Lane of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief) for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal involves the dutiable classification of skivers. The name designates the grain side of a sheepskin split in the pickled state, and subsequently tanned, dressed, and finished. While this portion of the sheepskin is designated as a "skiver," which is generally used in the making of sweatbands for hats, pocketbooks, the linings of valises, and similar uses, the inner half, when similarly tanned, dressed, and finished, is designated as a "flesher," and is principally, if not exclusively, used in the making of chamois. A sheepskin not split, but tanned, dressed, and finished, is known as a "roan."

These skivers when imported at the port of Philadelphia were assessed for dutiable purposes under the provisions of paragraph 451 of the tariff act of 1909 as "sheep * * * skins * * * dressed

¹ Reported in T. D. 31662 (20 Treas. Dec., 1183).

and finished." Protestants, who are the appellants here, allege, and here claim, that they are properly dutiable as split leather within the meaning of the proviso to paragraph 450 of the said act. The Board of General Appraisers held that they were properly dutiable as "all other leather" under a different provision of paragraph 451 of the act.

In our view of the case it is unnecessary to here decide whether they are dutiable as "all other leather," as determined by the board, or as "sheepskins dressed and finished," as found by the collector, for the reason that the applicable rate of duty in either case is the same. The question for determination, then, is whether or not skivers are "split leather" within the terms of the proviso to paragraph 450.

The determination of this question is given light by the legislative history of its adoption. It was not, as enacted, incorporated within the tariff act of August 5, 1909, it being in terms of a concurrent resolution correcting certain provisions of the act, passed after the adoption of the conference report by both Houses of Congress.

The related provisions of the tariff act of August 5, 1909, as finally passed, unchanged and uninfluenced by this resolution in so far as affecting hides and leather, were as follows:

451. Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and all other leather, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem; [Then follows the provisions for various other skins, as patent and japanned leathers and other specified leather, such as glove and pianoforte leather] * * * boots and shoes made of leather, fifteen per centum ad valorem: *Provided*, That leather cut into shoe uppers or vamps or other forms, suitable for conversion into manufactured articles, and gauffre leather, shall pay a duty of ten per centum ad valorem in addition to the duty imposed by this paragraph on leather of the same character as that from which they are cut.

461. Harness, saddles, saddlery, in sets or in parts, finished or unfinished, thirty-five per centum ad valorem.

676. (Free list.) Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this section.

The various phases of the provisions of paragraph 450, as adopted in reaching the form as finally approved by both Houses of Congress, unaffected by the concurrent resolution, were as follows:

Paragraph 581 of the free list as it passed the House read as follows:

581. Hides of cattle, raw or uncured, whether dry, salted, or pickled.

Paragraph 581 of the House bill was merged into paragraph 450 as it passed the Senate and read as follows:

450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, fifteen per centum ad valorem: *Provided*, That upon all leather exported, made from imported hides, there shall be allowed a drawback equal to the amount of duty paid on such hides, to be paid under such regulations as the Secretary of the Treasury may prescribe.

The same paragraph, as reported from the conference committee and adopted by the House and Senate, read as follows:

450. Hides of cattle, raw or uncured, whether dry salted or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, sole leather made from such hides shall pay a duty of five per centum ad valorem; that grain, buff, and split leather made from such hides shall pay a duty of seven and one-half per centum ad valorem; that boots and shoes, the upper leather of which is made wholly or in chief value from such hides, shall pay a duty of ten per centum ad valorem; that harness, saddles, and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather made from such hides, shall pay a duty of twenty per centum ad valorem.

As modified by the concurrent resolution referred to and finally adopted, it read as follows:

450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, grain, buff, and split leather shall pay a duty of seven and one-half per centum ad valorem; that all boots and shoes, made wholly or in chief value of leather made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species, including calfskins, shall pay a duty of ten per centum ad valorem; that harness, saddles and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of twenty per centum ad valorem.

In the ascertainment of the purposes and intention of Congress in the final adoption of the paragraph reference must be had to the current history of the times and of this legislation. The Congressional Record, Sixty-first Congress, first session, pages 4875 to 4954, inclusive, is the official record of that history. That such may be adverted to in the ascertainment of the intent of Congress and in explanation of ambiguous provisions of the law then enacted is well settled by the authorities.

In *United States v. Union Pacific Railroad Co.* (91 U. S., 72) the Supreme Court stated in construing an act of Congress that the courts may recur to the history of the times when it was passed in order to ascertain the reasons for, as well as the meaning of, the particular provisions in it.

In *Aldridge et al. v. Williams* (3 How., 8, 23), it is stated:

The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

In *United States v. Trans-Missouri Freight Association* (166 U. S., 290, 318), the court said:

* * * The only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

By adverting for this information to the separate enactments of the different Houses of Congress and the law itself it is shown that at and immediately prior to the passage of the concurrent resolution

which ultimately framed the language of paragraph 450, as before us for consideration, *all* hides of cattle were rated for duty at 15 per cent ad valorem; *all* boots and shoes made of leather at 15 per cent ad valorem; *all* harness, saddles, and saddlery at 35 per cent ad valorem; *all* band, bend, or belting leather, rough leather, and sole leather at 5 per cent ad valorem; dressed upper and "*all* other leather" at 15 per cent ad valorem; certain other specific leathers were rated at not less than 15 per cent ad valorem; and calfskins were free of duty.

The history of the times and the legislative history of this provision recorded as above stated, as well as the internal construction of paragraph 450, in its progress from the House to ultimate law, discloses that this provision was the subject of determined contention by different members of the legislative bodies. Upon the one hand certain Members of the Congress demanded that hides of cattle should be placed upon the free list. Upon the other hand the opponents of that contention demanded that hides of cattle should be made dutiable, as was already provided in the paragraphs above quoted, as the proposed and approved enactment prior to the passage of the concurrent resolution.

A compromise was effected, whereby it was agreed that the legislation adopted should express that hides of cattle, as defined in the resolution, should be free of duty, and that in consideration thereof the manufactured product of these hides should bear a less rate of duty than that previously adopted. It was a compromise agreement, intended to effect, and to effect only, that in consideration of free hides the products of which those free hides constituted the raw material should suffer a reduction in the rates of duty previously provided.

As paragraph 450 came from conference and was adopted by both Houses the proviso relating to the products of the free cattle hides, provided for in the purview of the paragraph, used the words "*made from such hides*," referring to such imported free cattle hides in each of its separate provisions. It was immediately contended that this language did not effect the terms of the compromise, and the concurrent resolution was adopted to meet these objections and to effect the compromise as agreed.

The concurrent resolution omitted these reference words. The reason for that, and that it was not to eliminate express application of the proviso to the purview or to extend the other provisions of the proviso to other paragraphs of the act, is plainly shown by the modifications made in the language under consideration.

Had the words "*made from such*" been left in the different parts of proviso as paragraph 450 was adopted, the proviso would have
ed solely to manufactures and products of *imported* hides, or, in

other words, hides which "shall be admitted free of duty." This would apparently have nullified the provision and manifested the impossibility, inasmuch as the purview of the paragraph referred solely to imported goods, of referring the proviso expressly thereto. Confining the proviso, however, to the *subject matter* of the purview by legal intendment, under the well-settled rules of construction, effected perfectly the intention of the Congress without militating against the literal or legal effectiveness of the paragraph itself.

Bearing in mind the purpose of the Congress, as thus indicated, we proceed to the inquiry whether or not upon the language adopted it effectively legislated its intention perforce of the language adopted.

The well-settled rule that a proviso must be related only to the purview of the paragraph to which it is added, unless *the language of the proviso indicates* a contrary intent upon the part of Congress, is such a well-settled rule of statutory construction that it needs no citation. It is, however, so aptly stated in Lewis's Sutherland Statutory Construction, section 352, that we hazard its quotation:

352. The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly intended. * * * In other words, the proviso will be so restricted *in the absence of anything in its terms*, or the subject it deals with, evincing an intention to give it a broader effect. * * *

Not only is a proviso thus construed with reference to its application, but the proviso itself in the scope of its words will be so strictly construed as to include within its terms as limited a subject matter as those terms will permit.

The same authority in the same section in this connection states:

The proper function of a proviso being to limit the language of the legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is engrafted.

At the outset, therefore, we are confronted with this elementary rule of construction which requires that unless the language of the proviso itself indicates that it shall be extended beyond a strict construction of its own words, and beyond the purview of the paragraph itself, that construction must not be adopted.

In terms the proviso extends to three classes of merchandise: (1) Grain, buff, and split leather; (2) boots and shoes made wholly or in chief value of leather, made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species; (3) harness, saddles, and saddlery composed wholly or in chief value of leather.

An examination of the paragraph of the law *in pari materia*, cited *supra*, shows that every subject matter included with the three provisions of this proviso had previously been made dutiable in express

terms. Grain, buff, and split leather were probably provided for in paragraph 451 as all other leather at 15 per cent ad valorem. Boots and shoes made of every kind of leather were provided for in paragraph 451 at 15 per cent ad valorem. Harness, saddles, and saddlery, whether made of leather or otherwise, were expressly provided for in paragraph 461 at 35 per cent ad valorem.

There was therefore absolutely no necessity to make further provision for duties upon these materials and articles unless it was intended by Congress to reduce the rates upon some only of those classes already provided for. If it had been the intention of Congress to reduce the rates only and not to limit the classes to which these reduced rates were applicable to some only of those already provided for, that purpose would probably have been effected and could better have been effected exactly as it was in other instances in this tariff act by *changing the rate only in the provision already written*. The fact that the Congress saw fit to adopt new language and to permit the other language covering the same subject matter to remain bears no slight evidence of the intention of Congress by the newly adopted language to differentiate the provisions already employed, which purpose is better subserved by relating the proviso to the purview of paragraph 450.

It is contended by appellants that the language employed by Congress in the second class included in the proviso expressly mentioning cattle hides and cattle skins of whatever weight of cattle of the bovine species, *including calfskins*, indicates an intention of Congress, perforce the maxim *expressio unius est exclusio alterius*, to confine only that part of the proviso to the purview of the paragraph, and, therefore, inferentially, to extend the other parts of the proviso beyond the purview of the paragraph.

There was a different reason warranting *and necessitating* the particular language as to this class of merchandise, the subject of the proviso, which did not obtain as to the other parts. In the presence of such and an express reason prompting the action of Congress, there is no latitude for the indulgence of an inference as to the intent of Congress. Indeed; the same evidence, which is the language used, that negatives any inference, expressly establishes the contrary. The language of the resolution, which is that of the provision before us for construction, was manifestly based upon the language of the enactment as adopted by both Houses upon the conference report. This part of the proviso there read —

that boots and shoes, the upper leather of which is made wholly or in chief value from such [cattle] hides.

The history referred to and the legislative language previously existing and as adopted indicates that it was the information of Congress that the provision as adopted was not only subject to

the objection previously indicated, but would include but few, if any, and probably no boots and shoes, as there were none such imported the upper leather of which was made wholly or in chief value of *cattle* hides. The further complaints were that the provision as drawn would cover only the ancient rawhide boot, a thing at the passage of the act comparatively unknown to the commerce of the country; that this provision would not cover boots and shoes made from hides of cattle the chief value of which did not reside in the upper leather; that the language "made wholly or in chief value from such hides" referred to "hides of cattle," and would not include, under the construction put upon these words by the long-existing practice of the customs, boots and shoes made in chief value of *calfskins*, although in every other particular and parts made of leather from cattle skins. The customs interpretation had affixed a definite line between cattle skins and calfskins, according to weight of the hides. In G. A. 4065 (T. D. 18837) and G. A. 4215 (T. D. 19716) it had been held, and that doctrine accepted for years, that cattle skins, green 25 pounds and under, dry 12 pounds and under, were free of duty as "skins not specially provided for" under paragraph 664 of the tariff act of 1897, which was identical with paragraph 676, *supra*, and were not included in the term "hides of cattle."

Hence the provision as adopted in the conference bill was limited in scope, as the objectors claimed.

To cover all of these objections, and not for the purpose of indicating by legal effect that the other provisions of the proviso were not limited to the purview of the paragraph, as indicated by the very words of this part of the proviso, the language employed was adopted. The legislative history of the times shows and fully corroborates this precise and detailed language to have been adopted and accepted under the terms of the compromise as expressing the intention and these purposes of the Congress, and not for the purpose of expressly relating this portion of the proviso to the purview of the paragraph.

Moreover, this part of the proviso, instead of supporting the inference suggested, evidences the exact contrary. What did Congress here do? Upon discovering that the proviso related by express words to *imported hides of cattle* only, and itself covered boots and shoes of *cattle* hides only, and that calfskins were made free by another provision of the law—paragraph 676, not referred to by this proviso—Congress set about first to correct the first limitation, which it did by striking out the words "made from such." Realizing that the proviso was still legally referred to the purview only of the paragraph, it then set about to include in this part of the proviso a subject matter not within the purview—boots and shoes of calfskins—but the subject of another paragraph, 451. In so doing it not only limited its language of extension to the classes of the subject matter of said

paragraph 451, but to one only of such, *eo nomine*, boots and shoes of calfskins. The words of Congress are those of carefully guarded, limited extension, "including calfskins." Here the rule of *expressio unius est exclusio alterius* encounters no contrary intent of Congress and *does* apply. Having expressly extended and limited this part of the proviso to one subject matter only of another paragraph of the law, the inference obtains that in all other particulars it is intentionally confined by Congress to the purview of paragraph 450.

That Congress deemed this proviso in its final framework as employed in the resolution as including by its language only matters expressly thereby excepted from the broader language *in pari materia* as previously written, and not as language coextensive in scope with that elsewhere written, is expressly indicated by the fact that in the resolution the repetition in paragraph 450, as adopted by the two Houses of "sole leather, at five per centum ad valorem," which then was and now is expressly provided for in paragraph 451 at the same rate, was avoided.

We think, therefore, that the internal framework of this proviso contains no language from which an intention may be inferred to extend its scope to other provisions of the law *in pari materia*. On the contrary, there is in addition to the foregoing other express language which has been construed by the Supreme Court of the United States as indicating a contrary purpose upon the part of Congress.

In *United States v. Klumpp* (169 U. S., 209, 215) a provision of the tariff act of 1894 was before the court for consideration. That act provides for free wool. Paragraph 297 thereof provided reduced rates on woolen manufactures. The tariff act of 1894 became operative in August, 1894, but provided that paragraph 297 should not go into effect until January 1, 1895. The proviso in paragraph 450 here is exactly similar in effect. The purview here went into effect August 6, 1909, when cattle hides became free. In the proviso it is expressly provided that *it* shall take effect on and after October 1, 1909. Of the provisions of the tariff act of 1894 of the same import the Supreme Court, through Mr. Chief Justice Fuller, in the case cited held the provisions related one to the other and comprehended the same materials:

The reason for the postponing of the taking effect of the reduction of duties obviously had nothing to do with the process of manufacture, but related to the material of which the goods were composed, which material had been relieved from duty by paragraph 685 of the act.

Congress undoubtedly concluded that the manufacturers of goods from wool had laid in a large stock of material, which equitably they should be allowed a reasonable time to work off, and that there was probably on hand a large stock of goods, to dispose of which reasonable time should be allowed, rather than that the large dealers should be induced to bring in foreign goods at a cost which involved ruinous competition; while at the same time the wool growers ought to have their original market until they could adjust themselves to the new condition of things.

From the language of suspension alone the court concluded the provisions related and the scope of the one limited to the subject matter of the other.

Obviously the date when the proviso is to go into effect here extends to that part of the provision relating to grain, buff, and split leather. In the presence, therefore, of the employment by Congress of language which has been expressly construed by the Supreme Court to indicate a fixed and certain purpose of Congress to refer the proviso to the purview of the paragraph, and in the absence of any language indicating a contrary intent, the rule of construction, if construction need be here invoked, that the proviso is to be strictly construed and refer only to the purview of the paragraph, obtains and leads to the conclusion that this proviso has no further application than to the purview of the paragraph of which it forms a part, and that when this language is strictly or liberally construed it does not extend to or include any of the merchandise included in the broader provisions of paragraphs 451 and 461, which are beyond the strict language of this proviso itself. This conclusion determines this case.

Affirmed.

STENGEL *v.* UNITED STATES (No. 584).¹

SHEETS OF ZINC ENAMELED AND A SUBSTITUTE FOR TILES.

The importation consisted of sheets of zinc on which several coats of enamel had been applied, one coat at a time, and after each application, baked in an oven. The processes involved, besides, the use of a power press in printing various colors on sundry of the zinc sheets, while all were varnished, embossed, and made true to edges, the completed article having the appearance of artificial tile; *Held*, the importation is not to be classified as zinc in sheets coated or plated with nickel or other metal or solutions, but as zinc partly or wholly manufactured, and they are dutiable under paragraph 199, tariff act of 1909.—*Lunham v. United States* (T. D. 31569); *Langerman & Petty v. United States* (75 Fed. Rep., 1), and *Dejonge v. Magone* (153 U. S., 562) distinguished.

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7145 (T. D. 31164).

[*Affirmed.*]

B. A. Levett for appellant.

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers affirming the assessment of the surveyor of customs at the port of Pittsburg on certain merchandise reported to him to consist of "zinc enamel sheets." The articles were assessed for duty at the rate of 45 per cent ad valorem under the provisions of paragraph 199 of

¹ Reported in T. D. 31063 (20 Treas. Dec., 1191).

the tariff act of 1909 for articles composed of “* * * zinc * * * or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.” They are claimed by the importer to be dutiable at $1\frac{1}{4}$ cents per pound under paragraph 194 of the tariff act of 1909 as “zinc * * * in sheets, coated or plated with nickel or other metal, or solutions.”

The importation consists of zinc in the form and shape of, and ready for use in their imported condition as, tiles or tiling for walls and ceilings and borders of the same. Some of the articles are $16\frac{1}{2}$ by 22 inches and the borders measure 5 by $22\frac{1}{2}$ inches.

The evidence shows that the sheets of zinc are first thoroughly cleaned, then given two or three coats of enamel, the sheets being put into an oven and baked at a temperature of 150° after each coat. Then such of the articles as are to be lithographed are placed in a power press and printed from lithographic stones, one color at a time, and after each printing a baking as before. The later processes, which are applied to all the goods, are varnishing, embossing, with dies specially made in appropriate designs, and finally the truing of the edges so as to make faultless joints when the tiles and borders are put upon the wall. Illustrative exhibits showing these successive steps are in evidence. When completed, the article presents the appearance of artificial tile. The indentations forming the squares in the tile are made by a press which is called an embossing press. It leaves these indentations or lines, and the lines have a special color. The evidence does not very clearly show how this coloring of the lines is produced, but it is material as affecting the appearance of the product.

Paragraph 194 reads as follows:

Zinc in blocks or pigs and zinc dust, one and three-eighths cents per pound; in sheets, one and five-eighths cents per pound; in sheets coated or plated with nickel or other metal, or solutions, one and three-fourths cents per pound; old and worn-out, fit only to be remanufactured, one cent per pound.

It is obvious, both from the term employed, “zinc in sheets,” as well as from the correlation of the terms employed in the paragraph, that the merchandise intended to be covered by this paragraph was sheets of zinc which retained their form and identity as such and were intended to be used as material for manufacturing articles as distinct from articles of manufacture ready for use.

Langerman & Petty v. United States (75 Fed. Rep., 1) is clearly distinguishable from the present case. The evidence in that case showed that the importation consisted of ordinary zinc sheets just as they came from the rolling mill, with a coating for the special purpose of lithographers. The importation varied in size from 10 by 14 inches to 34 by 48 inches. It was said—

Even if the coating for a special purpose has advanced the articles so that they may be adapted to a different purpose, they still remain zinc in sheets. There is no evidence that they are not sold by weight, or that they are commercially known by any

name other than lithographic zinc sheets. I think such large flat strips of zinc in the form in which they come from the rolling mill are zinc in sheets, and specially provided for under paragraph 213 of said act,

referring to the act of 1897, which corresponds to the paragraph in question here.

But in the present case the articles in question are something more than sheets, within the ordinary dictionary definition of that term. They are not flat, but have been given a different form and appearance. They owe their individuality and attractiveness to additional processes, and they are fully fitted for use as a distinct article, and are ready to be placed upon the wall in the form in which imported. They are also given a different name, such as *excalti*, *meti*, and *enametile*, which are trade names and are referred to in the trade as metal tiles.

It is unnecessary to determine whether the fact of commercial designation has been proved, as it is obvious from an inspection of the samples themselves that they would no longer retain the name of zinc in sheets, and an order given for zinc in sheets would not be understood to cover such articles as are here imported.

The case presents a question very similar to that involved in *Lunham v. United States* (2 Ct. Cust. Appls., 1; T. D. 31569), in which it was held that steel shapes, ready to be enameled and converted into pitchers, knobs, handles, spouts, etc., are properly held dutiable as articles composed of steel, whether partly or wholly manufactured. See also *United States v. Prosser* (1 Ct. Cust. Appls., 22; T. D. 30848); *Meyer & Co. v. United States* (1 Ct. Cust. Appls., 506; T. D. 31531). The articles here in question, as in the cases cited, are articles upon which no further work is necessary to be done to fit them for a specific definite use.

The importer's counsel places great reliance upon the case of *Dejonge v. Magone* (159 U. S., 562). In that case the court had under consideration a paragraph which read:

Paper hangings and paper for screens or fireboards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper not specially enumerated or provided for in this act. * * *

It was contended that the importation in question, which had been coated, colored, and embossed to imitate leather, or coated with flock to imitate velvet, was more properly classifiable as manufactures of paper. The court held, however, that it was established by the evidence beyond dispute that at the time of the passage of the tariff act there under consideration fancy papers were largely dealt in in commerce, and were well known in the trade and commerce of the country, and that there were a great variety of fancy papers, and that such designation covered both the importations out of which the controversy arose. It was said:

Nor is it at all probable that Congress would specifically impose a duty of 25 per cent upon paper hangings, and intend that an importation of velvet paper of a similar class to wall paper and used for wall decorations should be assessed as a manufacture of paper at a rate of 15 per cent ad valorem.

While, directly speaking, the products in question might be termed manufactures of the particular variety of paper stock employed as their basis, yet the resultant product of such manufacture was a higher and better grade of paper. There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other manufactures of paper. * * *

In the schedule of the tariff act of 1883 under consideration, Congress attempted a classification of paper generally. A duty of 20 per cent was laid upon "paper, sized or glued, suitable only for printing paper"; a duty of 15 per cent was laid upon "printing paper, unsized, used for books and newspapers exclusively"; a duty of 10 per cent was laid upon "sheathing paper"; and all other paper was embraced in the paragraph under which the paper in question was classified and made dutiable at 25 per cent ad valorem. As cheaper grades of paper than the writing and drawing paper enumerated in the paragraph last referred to were elsewhere referred to in the act, it is obvious that the expression "and all other paper not specifically enumerated or provided for in this act" meant precisely what was expressed, and embraced paper of any grade not elsewhere enumerated in the act. * * *

It follows from what has been stated that the court rightly refused the charges requested by plaintiffs in error. It equally follows that if the word "paper" had a well-known signification in trade and commerce in 1883, which embraced these products, that meaning would control.

It will be seen, therefore, that the case really rested upon a proved commercial designation of the importation, and is in that respect distinguishable from the present case.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* GOLDBERG (No. 588).¹

STATUTE OF LIMITATIONS.

Where an assessment had been protested and the entry had been retained for reliquidation, and on January 3, 1907, the collector proceeded to reliquidate the invoice in question and then again on December 4, 1908, would reliquidate the same invoice, a second reliquidation was barred. The protest had been satisfied by the reliquidation of January 3, 1907, the statute of limitations having begun then to run and more than one year having elapsed.—*United States v. Leng* (18 Fed. Rep., 15).

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers. Abstract 24520 (T. D. 31182.)

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Iceland N. Wood* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from the decision of the Board of General Appraisers sustaining the appellee's protest against a reliquidation of an entry by the collector of customs.

¹ Reported in T. D. 31664 (20 Treas. Dec., 1194).

The entry of the goods in question occurred January 31, 1898, and covered two invoices, numbered, respectively, 18637 and 18638. Four protests were filed, Nos. 5679, 5680, 5681, and 5682.

Protest 5682 related to piping or cord, contained in invoice 18637, which was assessed for duty at 60 per cent ad valorem and was claimed to be dutiable at 50 per cent. This protest was held by the collector to be valid and was retained for reliquidation under the authority of T. D. 4972 after the other three protests should have been passed upon by the Board of General Appraisers.

Protest No. 5679 was lodged against articles embraced in invoice No. 18638, and was sustained by the board, and the collector, on January 3, 1907, proceeded to reliquidate that part of the entry covered by invoice No. 18638 pursuant to this decision.

The collector also proceeded to reliquidate invoice 18637, covering articles on which the board had not acted, and in so doing committed a clerical error. This action was evidently taken for the purpose of answering the protest No. 5682, relating to piping or cord, and the reliquidation fully met the demand of the protestant, and by a clerical error went much further in reducing the amount of duty. Just what the protests Nos. 5680 and 5681 related to is not made very clear by the record. Government's counsel, however, apparently rely upon the force of protest No. 5682 as sustaining the right to the reliquidation which followed. This latter reliquidation occurred on December 4, 1908, the collector having discovered the error committed in the reliquidation of January 3, 1907. The board held, on the authority of *United States v. Vandegrift* (175 Fed. Rep., 772), that the reliquidation in question was improper and unauthorized, inasmuch as more than one year had elapsed after the entry. It may be added, more than one year had elapsed after the first reliquidation. More than this, it appears that the first reliquidation had fully satisfied protest 5682, the existence of which is relied upon by the Government as sustaining the right to reliquidate on the 4th of December, 1908.

Some criticism is made of the protest. We think, if subject to any criticism, it is that it restricts the court to the interpretation of section 21 of the act of June 22, 1874, and it is contended that this statute does not give the right of reliquidation after the lapse of a year from the date of entry. We think the protest sufficiently raises this question. We do not feel called upon to pass any opinion upon the question as to whether this statute has been modified by section 24 of the customs administrative act of 1890, corresponding to subsection 23 of section 28 of the act of August 5, 1909. Assuming that it has not, and that the limitation of section 21 to cases in which there is no protest applies, we have the question presented as to whether this protest which had been satisfied at the time of the

reliquidation of January 3, 1907, was any longer effective to stay the running of the statute of limitations as to reliquidation. Section 21 of the act of June 24, 1874, reads as follows:

Whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise delivered to the owner, importer, agent or consignee, * * * such statement of duties shall, after the expiration of one year from time of entry, in the absence of fraud, and in the absence of protest by the importer, owner, agent or consignee, be final and conclusive upon all parties.

In the case of *United States v. Leng* (18 Fed. Rep., 15) the words of this statute, "in the absence of protest," were construed to mean "the absence of any existing protest pending and in force at the expiration of the year or at the date of the proposed reliquidation; that is, a protest upon which proceedings are then pending, or which may serve as the basis of some future appeal to the Secretary, or of some suit in the courts."

In that case the first reliquidation had taken place and a subsequent reliquidation was attempted after the lapse of a year from the time, and it was said:

After the Secretary's first decision, and the reliquidation made under it, in accordance with the defendant's protest and appeal, no further protest or appeal, either to the Secretary or to the courts, was taken, or could be legally taken, by the defendant, because that decision had sustained all the defendant's claim as set forth in his protest; and by section 2931 that decision incontestably became "final and conclusive" upon him. The former protest was, therefore, wholly spent; so that at the expiration of the year from the date of entry, there was no protest which had any vitality, or which could by any possibility become the basis of any further proceedings. It had been completely disposed of by the Secretary's decision and order sustaining it, and by the reliquidation under that order, and the settlement and payment made in accordance with it.

The case of *Kendall v. Lyman* (161 Fed. Rep., 652) appears to be in conflict with this reasoning, but we think the case of *United States v. Leng* states the better rule. Referring to *Kendall v. Lyman*, the Circuit Court of Appeals for the Third Circuit, in *Klump v. Thomas* (162 Fed. Rep., 853), says:

Assuming, for argument's sake, that such statute applies where protests are filed, though the contrary has been held in *Kendall v. Lyman* (161 Fed. Rep., 652), it is clear to us that no limitation would run while a protest was pending and undecided. Statutes of limitation are statutes of repose, and are based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made. But where litigation is going on, where the parties are using legal proceedings to effect a settlement, it would be at variance with the principles underlying limitations to hold that such statutes were then running. Hence the doctrine that the bringing of a suit suspends the running of a statute. "Fraud, or the pendency of a protest which tends to retard the proceeding, extends the time." *United States v. Fox* (D. C., 53 Fed. Rep., 536).

Applying this rule to the case in hand, there would be authority for saying that so long as the protest No. 5682 was in force the

statute of limitations would not run against the right to reliquidate. But when that became satisfied by the first reliquidation, if we should treat such reliquidation as an original settlement, there would be no authority for extending the time for nearly two years to permit of a second reliquidation.

It follows that the decision of the Board of General Appraisers should be *affirmed*. It is so ordered.

UNITED STATES *v.* MEADOWS (No. 598).¹

COMPONENT OF CHIEF VALUE IN COTTON AND LEATHER SLIPPERS.

The merchandise consisted of slippers made of cotton and leather, the parts of the slippers composed of each of the two materials being made separately for use in producing the completed article. In determining the component of chief value in merchandise of this kind inquiry will be made in each case as it presents itself to discover at what stage the several parts were completed for use in being put together as a completed whole; that stage will be "its condition as found in the article." Here the expense of sewing the pieces of cotton cloth together, in preparation for uniting them with the leather parts, enters into the value of the cotton so employed. According to the evidence cotton was the component of chief value in these slippers and they are dutiable under paragraph 324, tariff act of 1909.—Seeberger *v.* Hardy (150 U. S., 420).

United States Court of Customs Appeals, May 29, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7168 (T. D. 31297).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

B. A. Levett for the appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation in this case consists of slippers composed of cotton and leather. They were assessed for duty at the rate of 50 per cent ad valorem under the provision for articles of wearing apparel of which cotton is the component material of chief value in paragraph 324 of the tariff act of August 5, 1909.

The appellees claim duty should have been taken at the rate of 10 per cent ad valorem under paragraph 450 of the same act as shoes in chief value of leather made from hides of cattle of the bovine species.

The United States does not claim that the provisions of paragraph 450 are inapplicable if it be held that paragraph 324 does not apply, and it is therefore only necessary to insert here paragraph 324 and that part of paragraph 481 which defines the words "com-

¹ Reported in T. D. 31665 (20 Treas. Dec., 1197).

ponent material of chief value" found in paragraph 324. They are as follows:

324. Clothing, ready-made, and articles of wearing apparel of every description, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this section, fifty per centum ad valorem.

481. * * * And the words "component material of chief value," wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. * * *

The only question in the case is whether the cotton or the leather of which these slippers are made is the component material of chief value.

The facts are undisputed and are as follows: The soles and heels of the slippers are made chiefly of leather from the hides of cattle of the bovine species, while the uppers are made of cotton. In the process of making the slippers the cotton cloth, which afterwards forms the uppers, is first cut to shape ready to be put into the slipper. It is conceded that the cost of this operation should be applied to the cotton. The leather composing the sole and heel undergoes cutting to shape and certain other minor operations to bring it into condition ready to be put into the slipper, and it is conceded that the cost of these operations should be applied to the leather. After the pieces of cloth have been cut to shape to form the uppers and before being united to the soles they are sewed together with cotton thread. To do this sewing, including the thread used therefor, costs 9 pence per dozen pairs, which, if added to the cost of the cotton composing the uppers, renders the cotton the component material of chief value. If it is not so added, the leather is the component material of chief value.

Restated, and including the respective items of cost, the essential facts are as follows: The conceded value of the cotton in the slippers is 3 shillings and 11½ pence per dozen pairs; the conceded value of the leather is 4 shillings and 7 pence per dozen pairs. If the 9 pence, which is the cost of the thread and work necessary to sew the uppers together, be considered as a part of the value of the cotton, then the cotton is the component material of chief value; otherwise not. The real question, therefore, is whether the 9 pence per dozen pairs is a part of the value of the cotton in its condition as found in the slippers or whether it is a part of the expense of manufacturing the slippers and so not be considered in determining the value of the cotton therein.

It is agreed that the cost of attaching the heel and sole to the upper is an expense incident to the manufacture of the slippers and applies to both the cotton and the leather. It is therefore to be disregarded in arriving at the value of the respective component materials of the slippers.

It appears from the record that upon the first consideration of this case the Board of General Appraisers unanimously sustained the protest and reversed the action of the collector. Thereafter a rehearing was granted upon the request of the United States, whereupon a majority of the board adhered to its previous decision, while a minority favored sustaining the collector's action. Able and exhaustive opinions, presenting fully the respective views of the majority and minority members of the board, are contained in the record.

The question involved is not entirely free from difficulty and is said to be of considerable importance in customs practice.

Both sides rely upon the case of *Seeberger v. Hardy* (150 U. S., 420) as authority, and we proceed to its consideration. The articles there involved were opera glasses composed of glass lenses in a metal frame with a covering of shell, and the question arose whether the component material of chief value was metal, shell, or glass, and therefore under which of the applicable paragraphs of the tariff act of March 3, 1883, they should be assessed for duty. The question before the Supreme Court involved the construction by it of the following clause, which by the provisions of the act of 1883 was made a part of Revised Statutes, section 2499:

SEC. 2499. * * * And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates. * * *

The court below had charged the jury that to determine the question as to which of these different materials—manufactures of metal, manufactures of shell, or manufactures of glass—was the component material of chief value, “they must ascertain what were their values at the time they were in such condition that nothing remained to be done upon them except putting them together to make the perfected glasses,” and the correctness of this instruction was reviewed by the Supreme Court. We quote from the opinion in that case sufficiently to show the facts and the holding of the court:

These cases turn upon the question of whether in estimating the value of the component materials of which a certain manufactured article is made, the value of the materials shall be taken in the raw and unmanufactured condition in which the manufacturer receives them, and before their respective values have been enhanced by work expended upon them, or in the condition that nothing remains to be done upon them by the manufacturer except putting them together to make the completed glass. * * * The manufacturer bought the metal in the shape of ingots, the shell in the natural form of mother-of-pearl, and the glasses in the rough state in which they leave the cast. In neither case did the defendant introduce any testimony. Nothing, therefore, appears in the record as to the value of the materials when purchased appropriate to each opera glass. It is evident that the question involved is one of considerable importance, as in some articles, the raw material is the main cost, and in others, the labor. * * * We think * * * that the value of the

materials should be taken at the time they are put together to form the completed glass. There are grave difficulties in making the estimation at any other time. Whether, for instance, the shell shall be taken in its rough and uncleansed state as it comes from the animal, or after it has been cleaned and polished. Shall the glass be taken in its polished or unpolished state? Shall the value of the metal be taken immediately after it is smelted or in a more advanced state of manufacture? The position of the Government seems to be that the value of the component materials should be taken as they go into the hands of the manufacturer. But one manufacturer may buy them in their rough state, another in their polished state, and another in their final state, ready to be put together in the form of glass. The value of the raw material, as is shown in this case with respect to the shell and copper, may be subject to violent fluctuations. One manufacturer may have bought them at a high price, another at a low price, both being held a considerable time in stock. What price shall govern? Thus, in appraising the value of a piece of furniture made of wood and silk plush, it would be obviously inequitable to take the value of the lumber as it comes from the tree, and the silk from the worm or the spinner. The true rule would seem to be to take each of them as they go into the furniture.

In the opinion the Supreme Court also referred to the fact that in the act of 1890 Congress had provided that "the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article," which it will be noted is identical in language with that part of paragraph 481 here under consideration, regarding which the court said in effect that this statutory provision was designed to settle the question that the labor put upon the raw material should be included in determining the value of the component material and that it "was merely declaratory of the law."

It will be observed that although the court in this case clearly declared that the value of the materials should be determined as of the time when they had reached such a condition that nothing remained to be done upon them by the manufacturer except putting them together, there still remains open in each case that may arise the determination of the question as to whether or not that stage has or has not been reached, and this is the precise issue here.

A similar question was passed upon in *United States v. Hoeninghaus* (137 Fed. Rep., 478). The Circuit Court of Appeals for the Second Circuit held that the cost of warping silk yarn, which was the last process to which the silk was subjected before weaving it with cotton filling to make cloth composed of silk and cotton, was a part of the value of the silk as a component material of the cloth. In its opinion the court there in substance said that it appeared in *Seeberger v. Schlesinger* (152 U. S., 581) that the shells which were a part of the shell opera glasses under consideration in *Seeberger v. Hardy*, *supra*, had been brought to the proper polish before they were united with the tubes that contained the lenses and which when united produced the opera glasses, and they likened the warping of the silk to the polishing of the shells as being in each case the last treatment or manipulation that the component material received to bring it to proper shape to form a part of the completed article.

Again, in *United States v. Johnson* (154 Fed. Rep., 39), decided by the Circuit Court of Appeals for the Second Circuit, the articles were catheters and bougies. The evidence showed they were made, in substance, in the following manner: A tubular core of cotton or silk was first made and then treated to several coatings of varnish. The varnish was made of copal gum and linseed oil. After these coatings had been given to the core and the varnish had dried sufficiently workmen manipulated the same by hand to smooth the varnish and give the core the requisite degree of flexibility. After this had been accomplished the varnish was polished by hand with pumice stone and a cloth. It appeared that the value of the cores before receiving the varnish was greater than the value of the varnish, taking into consideration the value of the oil and copal which composed it and the expense of mixing the two; and that the cost of the labor of applying the varnish to the cores was greater than either the value of the cores or the value of the varnish. It was claimed by the importers that the cost of applying this varnish and manipulating the cores should not attach to the final product but was a part of the cost of the varnish in the completed article and, therefore, that the varnish was the component material of chief value. The court held that the cores were the component material of chief value and that the cost of applying the varnish to the cores was to be treated as attaching to the completed article and not to either of the component materials, assuming varnish to be one of the component materials. An application for a writ of certiorari in this case was denied by the Supreme Court (207 U. S., 595).

These three cases are all that it seems necessary to consider in disposing of the case at bar.

Here the slippers are made of leather and cotton cloth, the leather comprises the soles and the heels; whether the soles consist of more than one thickness, and if so how the same are fastened together does not appear. The uppers consist of several thicknesses of cotton cloth cut to shape. It is conceded that the expense of so cutting these pieces of cloth attaches to the cost of the cotton as the component material; that the expense of shaping the soles and heels attaches to the cost of the leather as the other component material; and that the expense of attaching the uppers to the soles and heels is a part of the expense of manufacturing the slippers and so attaches to neither the leather nor the cotton as a component material.

The substance of the appellant's contention is that the cotton in the slippers, and as therein found, has been cut in pieces of the required sizes and shape and then sewed together; that all this was done before the two component materials of chief value, namely, the leather and the cotton, were united to make the finished article, the slippers, and that this constitutes the manipulations which the cotton has received to bring it to such a condition that nothing remains to be done thereto except to put the two component materials together, and it

is urged that the cost of sewing together these uppers is a part of the value of the cotton as a component material, equally as is the cutting out the same, which is concededly so.

The gist of the appellee's contention is that the Government's counsel confuses the process of putting the components in condition to be put together with the process of putting them together, and that he treats the upper as the component and not the cotton. The appellee further says that after the several parts of the upper have been cut to proper shape and size the next process to which they are subjected is to assemble them as parts of the slippers, and that the sewing them together is such a process.

It is pointed out that if this is not so it leaves it to the option of the manufacturer by a single change in the order of his processes to thereby determine which of component materials is the one of chief value. That in this case if the manufacturer had seen fit to combine the process of sewing the uppers together with that of uniting the uppers and the sole, as a result thereof the contention of the Government clearly could not be maintained. To this reply is made that it is true that the chronological order in which processes are applied may have the result claimed by appellee, but that does not affect the rule that whatever is in fact done to put the components into such condition that nothing remained to be done thereto except to put them together must still have force, and that in this case the sewing of the uppers was done before they were joined to the soles, as a result of which final process the slipper was produced.

We recur to the case in the Supreme Court. The component materials there were manufactures of glass, of shell, and of metal. In just what state of finish they were when united does not clearly appear, neither does it appear whether the opera glasses after the components were united received any further treatment or finish, but the court said that whatever was done to each of these components before they reached such a condition that as a component nothing further remained to be done thereto should be a part of the value of the respective component parts.

It may be that in the case at bar the manufacturer might have adopted a different order in combining the component materials, but we take the facts as they appear and do not concern ourselves with possibilities.

Ordinarily it would seem that in the manufacture of articles composed of two or more components, one of which would be of chief value, the amount of treatment received by each before being put together and the precise order as to time in uniting them to make the finished article, would be determined in view of the results obtained, and that course would be adopted that gave the best results. Mechanical appliances may be changed or new methods may be discovered, as a result of which a different chronological order of combination

may be found more advantageous than the one theretofore in use. In each case, however, inquiry will show at what stage the component parts have been made ready to be united to form the complete whole, and at that stage its condition will be "its condition as found in the article." Such is evidently the theory of the decisions of all the cases above referred to and the reasoning should be applied in the case at bar.

Here the cotton composing the uppers was sewed together before it was united with the leather, and it is found in that condition in the finished slippers.

In the manufacture of the slippers in this case the cotton had not reached the condition which required nothing more to be done thereto before being united with the leather until the pieces of cloth were sewed together. The expense of sewing them, therefore, attaches thereto and renders cotton the component material of chief value, regardless of the name by which these pieces of cotton were called after the sewing had been accomplished. They may be called uppers, or they may be called manufactures of cotton, as were the glass, metal, and shell in the Seeberger case termed manufactures of these articles respectively, but the *fact* remains, nevertheless, that it is the *cotton* that is the component material.

The result is that the judgment of the Board of General Appraisers is *reversed*.

TILGE v. UNITED STATES (No. 274).¹

PETITION FOR REHEARING DENIED.

Reviewing the decision in *Tilge & Co. v. United States* (T. D. 31507), the decision is adhered to. The court did not there hold an appraising officer had no jurisdiction to appraise any of the merchandise of a consignment unless he had examined the samples deposited at the public stores, nor did it hold that samples forming a part of the importation can not, when duly authenticated, be accepted by appraising officers for jurisdictional purposes. It was there held, however, that no process was permissible "other than the law provides"; and that while the law provides substitute processes, compliance with any of these was not averred in the case as presented for determination here, and the decision as rendered was based simply on noncompliance with the law's requirements. What would or would not constitute a proper waiver or stipulation to avoid the stricter operation of the statute will depend on the facts of record in the particular case.

United States Court of Customs Appeals, May 31, 1911.

PETITION on behalf of the Government for rehearing in *Tilge & Co. v. United States* (T. D. 31507).

[Denied.]

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the petition.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

PER CURIAM: This is on a petition for a rehearing. This case, decided April 10, 1911 (1 Ct. Cust. Appls., 462; T. D. 31507), was,

¹ Reported in T. D. 31676 (20 Treas. Dec., 1240).

as appears in the decision thereof, "argued before this court and submitted with the case of Loeb & Schoenfeld (suit 69), previously decided (1 Ct. Cust. Appls., 385; T. D. 31479). In that case we reviewed the law applicable to both cases."

The petition recites:

1. The decision of the court lays down the proposition that a general appraiser has no jurisdiction to reappraise any of the merchandise on an invoice, unless he has personally examined the particular package or packages (at least 1 of every 10 on the invoice) that have been designated by the collector to be sent to the public stores, in accordance with section 2901 of the Revised Statutes.

The court holds that there is no permissible legal substitute for this examination, and that no samples of the imported merchandise, however clearly proven as representing it *or as being a part of it*, can avail to give the general appraiser jurisdiction over the invoice.

It is evident that counsel has misapprehended the scope of the decision in the present case. What was decided is determined by the question at issue in the case. As was said by Lord Manners in *Revell v. Hussey* (2 Ball & B., 286):

It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply; it has a tendency only to misrepresent one judge and to mislead another.

In the Loeb & Schoenfeld case the whole importation was the subject of appraisal and the appeals therefrom. It was conceded and the board found that—

One package in every 10 and 1 package from every invoice was sent to the public stores, and the merchandise therefrom, or sufficient samples of it, was before the local appraiser, the general appraiser, and the board of three general appraisers.

The board further found:

It does conclusively appear that a large number of the items upon the invoices here under consideration were not contained in the public-stores cases, nor was merchandise of like patterns and designs.

Upon this record, involving the entire importation, the importers tendered the issue and made claim that it was not sufficient for the board of three general appraisers to examine the public-store cases legally required under section 2901 of the Revised Statutes, but that in view of the finding of the board that some of the importation was not represented by the merchandise or samples thereof in the public-store cases the reappraisal proceeding by the board was invalid for want of jurisdiction.

This court held that in such cases, if the reappraisal board examined the public-store cases only, which the record showed it did, there was a valid reappraisal.

The Tilge case was likewise an appeal to reappraisal involving the whole importation. The court said:

Indeed, the samples in this case, as shown by the record, were not even selected or taken from the importation by the United States consul, a Government official, but were produced at his office by a member of the exporting firm with a statement that

they were samples of the merchandise covered by the invoice then being consulated. There was no regard had as to the statutory requirements relating to the number of packages from which these samples should be taken. There was no determination by any appraising officer whether or not the samples had of the designated packages were sufficiently representative of the designated packages. Indeed, the general appraiser returned the contrary. * * * We do not think it can in any sense be held a compliance with the law that *the collector shall select a certain number of samples of the importation and designate these for examination while in the customs custody. The law admits of no substitute processes other than it provides; but, as we have held, is mandatory in its provisions.*

The court did not hold that an appraising officer had no jurisdiction to appraise *any* of the merchandise of an invoice unless he had examined the public store packages, nor that samples, a part of the importation, can not, when duly authenticated, be accepted by appraising officers for jurisdictional purposes.

The court said:

The law admits of no substitute processes other than it provides.

A glance at the statutes, decisions, and regulations will reveal that the law does provide other substitute processes. What was held was that the one adopted in the Tilge case was not one of these.

We held in effect that section 2901 of the Revised Statutes is mandatory and not directory, and in so holding we considered the case in line with decisions of other courts where similar questions have arisen. That section prescribes in part the procedure of all officers performing appraisement functions. That all appraisers, and those performing such duties, local and general, acting singly or by boards, are officers constituted under and whose powers and procedure are created, limited and defined by statute is undeniable. *Dooley v. United States* (182 U. S., 222), *Schillinger v. United States* (155 U. S., 163, 166), *Anglo-Californian Bank v. United States* (175 U. S., 37), *Anglo-Californian Bank v. Secretary of Treasury* (166 U. S., 722), *Aufmordt v. Hedden* (137 U. S., 310, 324), *Nichols v. United States* (7 Wall., 122, 126), *D. M. Ferry & Co. v. United States* (85 Fed. Rep., 550), *Boswell v. United States* (9 How., 336), *Thatcher v. Powell* (6 Wheaton, 119), *Sheby v. Bacon* (10 How., 56), *Sheldon v. Sill* (8 How., 441), *Greely's Administrator v. Burgess* (59 U. S., 18 How., 413, 416), *Oelberman v. Merritt* (123 U. S., 356), *Stairs v. Peaslee* (18 How., 521), *Burgess v. Converse* (2 Curt., C. C., 216), *Origet v. Hedden* (155 U. S., 238), *Cheatham v. United States* (92 U. S., 85), *United States v. Beer* (150 Fed. Rep., 566), *United States v. Loeb* (107 Fed. Rep., 692), *Ex parte Clark* (87 Cal., 640), *In re Stevens* (83 Cal., 322; 17 Am. St. Rep., 252), *Furgeson v. Jones* (17 Or., 204, 11 Apls. St., Rep., 814), *Tyler v. Reynolds* (53 Iowa, 146), *Shearer v. Weaver* (56 Iowa, 578), *Keegan v. Geraghty* (101 Ill., 26, 39), *In re Moore* (14 R. I., 38), *Freeman v. Strong* (6 Dana, 282, 32 Am. St. Dec., 70), *Rachel v. Emerson* (6 Mon. B., 280), *Small v.*

Small (2 Bush, 46), *Mendall v. Rickets* (6 Marsh, J. J., 592), *Sanborn v. Bellows* (22 N. H., 473), *Carlton v. Washington Ins. Co.* (35 N. H., 166), *Smith v. Fowle* (12 Wend., 9), *Emburg v. Conner* (3 N. Y., 511, 53 Am. St. Dec., 325), *Gunn v. Howell* (27 Ala., 675), *Foster v. Glazener* (27 Ala., 396), *Barry v. Patterson* (3 Humph., 314), *Smith v. Rice* (11 Mass., 506), *Cook v. Darling* (18 Pick., 393), *Sears v. Terry* (26 Conn., 285), *Long v. Hewitt* (44 Iowa, 365), *Windsor v. McVeigh* (93 U. S., 274), *Edwards v. Bates County* (117 Fed. Rep., 529), *Driggers v. Cassady* (71 Ala., 533), *Territory v. Delinquent Tax List* (3 Ariz., 91), *Gibney v. Crawford* (51 Ark., 40), *Dorrance v. Raynsford* (67 Conn., 6, 52 Am. St. Rep., 266), *Haywood v. Collins* (60 Ill., 336), *Coward v. Dillinger* (56 Md., 61), *Wight v. Warner* (1 Dougl. [Mich.], 388), *Platt v. Stewart* (10 Mich., 265), *Marks v. McElroy* (67 Miss., 547), *Freeman v. Thompson* (53 Mo., 198), *State, Baxton, prosecutor v. Jersey City* (N. J. L., 192), *Adams v. Jeffries* (12 Ohio, 272, 40 Am. Dec., 477), *Guilford v. Love* (49 Tex., 743), *McAllister v. Gugenheimer* (91 Va., 320, 21 S. E., 475), *Davis v. Point Pleasant* (32 W. Va., 294, 9 S. E., 228), *Stewart v. Milburn Gin & Mach. Co.* (35 Fed. Rep., 230), *Murray v. American Surety Co.* (61 Fed. Rep., 276), *Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. R.* (90 Fed. Rep., 177), *Central Stock Yards Co. v. Louisville & N. R. R. Co.* (112 Fed. Rep., 826), *Postal Teleg. Cable Co. v. Southern R. Co.* (122 Fed. Rep., 159), *Birdseye v. Shaeffer* (37 Fed. Rep., 824), *Harland v. United Lines Teleg. Co.* (6 L. R. A., 253, 40 Fed. Rep., 310), *The Hungaria* (41 Fed. Rep., 112), *North German Lloyd S. S. Co. v. Hedden* (43 Fed. Rep., 25), *United States v. Southern Pac. R. Co.* (49 Fed. Rep., 300), *Re Cilley* (58 Fed. Rep., 978), *United States v. Mar Ying Yuen* (123 Fed. Rep., 160), *United States ex rel. Maxwell v. Barrett* (135 Fed. Rep., 194), *Iverson v. Saulsbury* (68 Ga., 794), *Chumasero v. Potts* (2 Mont., 290), *Bierbower v. Miller* (30 Nebr., 177), *State v. University* (65 N. C., 715).

It is pointed out in the decisions in question that the two decisions of the Supreme Court of the United States, *Erhardt v. Schroeder* (155 U. S., 124), and *United States v. Ranlett* (172 U. S., 133), indicating the contrary, expressly excepted reappraisement proceedings such as were these cases where value and not classification was the real issue. So that these cases also may be classed with that well-established, long-continued uniform line of authorities, including the Supreme Court of the United States, almost if not every Circuit Court, and Circuit Court of Appeals, announcing and reaffirming the doctrine stated.

In the presence of this uniform array of authorities this court did not feel warranted in approving the decision of the board based upon the contrary doctrine. There is nothing, however, in the determination that Congress enacted this law to be observed and not to be

disregarded by those performing duties therein prescribed which in anywise changes the well-settled customs procedure of the country or any of the board rules or departmental regulations calculated to effect these purposes.

The orderly course of appraisement and reappraisement proceedings is as follows: Upon entry the collector designates, pursuant to section 2901 of the Revised Statutes, upon the invoice and other papers 1 package in 10 and at least 1 package in every invoice for examination in appraisement proceedings. These packages are forwarded to the public stores together with the invoice and other papers indicating the selected packages. Meanwhile the merchandise is generally released to the importer upon a general six months' bond conditioned that it will be delivered to the order of the collector at any time within 10 days after the packages sent to the public stores have been appraised and reported to the collector. This appraisal means, in case of appeal to a general appraiser or board of general appraisers, final appraisal. Upon arrival thereat they are opened, examined, and appraised by the local appraiser, and the number of yards, parcels, or quantities thereof ascertained under section 10 of the customs administrative act, and so reported to the collector under section 2899 of the Revised Statutes, section 13 of the customs administrative act, and Treasury regulations. The performance of this duty is, by section 13 of the customs administrative act, characterized the "decision of the appraiser." This duty upon his part, as commanded by section 2901 of the Revised Statutes and article 861 of the Customs Regulations of 1908, is as follows:

ART. 861. *Duties of appraiser.*--It is the duty of the appraiser, or officer acting as such, to make careful examination of any merchandise which the collector designates for that purpose, and to appraise the actual market value or wholesale price thereof at the time of exportation, in the principal markets, and in the currency of the country whence the same was imported; also to ascertain the quantities thereof, except of such goods as require weighing, gauging, or measuring by the surveyor. These facts will be indorsed upon the invoice, which shall be signed by the appraiser.

His return to the collector is regulated by article 863 of the same regulations, which in brief prescribes that:

ART. 863. * * * 1. Opposite each item or group of similar items upon the invoice the examiner will note in red ink his advisory classification of such item or items. * * * 2. When invoice prices are advanced to make market value there should be written or stamped in red ink over or opposite each item advanced the words "Appraiser advances to make market value," with the amount per unit of the advance. 3. At the foot of each invoice * * * should be placed also in red ink a summary * * * showing the marks and numbers of the cases examined, whether or not the unexamined packages have been classified by invoice description with those examined, any discrepancy between the invoice quantities and those actually found upon examination, and whether or not the invoice values are found to be correct. * * *

The decision of the appraiser, therefore, as returned to the collector, separately notes his findings and decision as to the dutiable value of each item and each instance wherein the goods are or are not "found correctly and fairly invoiced and put up," as required by law. Due notice thereof is, under article 897, Customs Regulations, immediately given the importer, who, if dissatisfied, must appeal to a general appraiser in a stated time.

It is elementary in all such cases of appeal that it is limited to the subject matter thereof, and as to all other matters not made the subject of appeal the decision from which appeal is taken becomes final and conclusive. If, therefore, the review sought by a single general appraiser is confined to the dutiable value of but part of the merchandise; or if the appeal relates to the dutiable value only of the whole of the merchandise, all other matters of ascertainment or appraisement required by the statute and made by the appraiser become final and conclusive, and the dutiable value alone of that part of the invoice, or the dutiable value of the whole of the invoice, as the case may be, or other matter expressly made the subject of appeal, constitutes and limits the inquiry by the general appraiser to those matters alone. On appeal from the decision of the general appraiser the same considerations obtain, the inquiry being confined and limited to the subject matter of the appeal and not to any other issue or merchandise covered by the invoices.

There is no jurisdiction vested in the general appraiser or Board of General Appraisers of the particular case save by that conferred by the particular appeal, hence no power to determine matters not covered by such appeal. This principle was announced by this court in *Smith & Co. v. United States*, No. 148 (T. D. 31527), and is provided by section 13, customs administrative act. See *Worthington v. Beeman* (91 Fed. Rep., 232), *Sharp v. Fields* (5 Lea [Tenn.], 326), *Harris v. Harris* (2 R. I., 538), *Inman v. Henderson* (29 Oreg., 116), *Hall v. McCormick* (31 Minn., 280), *Gleiser v. McGregor* (85 Iowa, 489), *Luck v. Luck* (83 Cal., 574).

The record upon appeal, therefore, gives notice to each, the general appraiser and in turn the Board of General Appraisers, of the scope and limits of the appeal to be heard *de novo* and the public-store packages legally designated for examination.

While the law dictates an examination, it is silent as to the character and extent of that examination; but inasmuch as the evident object of this examination is that the appraisers may be satisfied as to the dutiable value of the merchandise it is apparent that the extent, as well as the character of the examination, must be determined by the appraisers respectively according to the circumstances of each case.

The petition assuming a contrary rule to have been announced by this court alleges—

That a complete examination of the packages that happen to be picked out by the collector is not necessary in order to give jurisdiction in reappraisement cases (even where the reappraisal is held by a merchant appraiser and a general appraiser prior to the act of 1890).

That is true, and there is nothing in either of these decisions holding otherwise. On the contrary this court, in the case of *Beer v. United States* (1 Ct. Cust. Appls. 484; T. D. 31526), distinctly annunciated the same doctrine. In that case we held in effect, in line with the holding of *Origet v. Hedden* (155 U. S., 228, 239), that when jurisdictional requirements were satisfied, to wit, that the public-store cases in the one instance, or the packages the subject of appeal in the other instance, were before the general appraiser or Board of General Appraisers, their method of procedure was beyond the inquiry of this court. We held there that they could give some or no effect to the evidence or any part thereof, that they could adopt whatever formulas or calculations, or, forsooth, examination, as in their judgment conduced to a proper conclusion, and it is within the very essence of the expressions in that decision by this court that *what* examination, as distinguished from *an* examination, shall be made by the appraising officers of the samples or packages is something which they must determine for themselves, and when determined is final and conclusive. If the single general appraiser or Board of General Appraisers deemed an examination of the samples duly selected and preserved for that purpose a sufficient examination of the merchandise to meet the ends of justice, that is a matter for them to decide and not for this court to review.

The Treasury Department has promulgated regulations going to the selection of samples in reappraisement cases; the Board of General Appraisers has likewise adopted rules and regulations in conformity with the Treasury Regulations, necessitated by the dual authority of the department and the board, providing for the selection of samples or goods the subject of reappraisement, their retention, release, etc.

Article 896, Treasury Regulations, 1908, which was T. D. 10355, provides:

ART. 896. * * * When * * * an appeal to reappraisement is taken, the merchandise in customs control may be delivered to the importer upon his filing a stipulation that he will abide by the result of the reappraisement on samples, the same as if the merchandise was before the general appraiser, * * *. In all cases the assent of the Board of United States General Appraisers must first be obtained.

In the *Loeb & Schoenfeld* case we held of this practice and regulation "that now is and has been the case ever since the organization of the Board of General Appraisers."

Article 1543 of the Treasury Regulations, 1908, and rules XXIX and XXX of the Board of General Appraisers, amply provide for the selecting and retaining of samples for reappraisement purposes by the general appraiser and Board of General Appraisers, whereupon release orders may be given for the remainder of the merchandise, upon compliance with the legal requirements.

These regulations are calculated to reach the ends of justice in each case. If the general appraiser or Board of General Appraisers, respectively, sitting in the case deem these samples duly selected sufficiently representative of the merchandise before them for appraisal, they may proceed. We so held in the Beer case. If they do not deem them sufficient, whatever the reason, they have authority and power under section 2801, Revised Statutes, of ordering the whole or any part of the importation before them. Under section 2899 of the Revised Statutes it is made the duty of the importer to hold this merchandise, available for examination in a manner therein and in his bond prescribed, until 10 days after final appraisal or to compensate the Government under his bond for not so doing. When, therefore, by an appeal the general appraiser, and in turn the Board of General Appraisers, are given jurisdiction of an appraisal, the record advises them of the precise subject matter thereof, what packages are in public stores or elsewhere subject to their order and examination and any goods not therein the subject of appeal, and the goods therein not the subject of appeal, and therefore unnecessary of examination. From this record he and they can determine precisely if samples will suffice for examination, and if so, what samples, and what of the goods may on application be released, and each is fully empowered to consent thereto. If examination of these samples duly selected and preserved is by him and the Board of General Appraisers deemed sufficient, that concludes the matter. This procedure, however, in the Tilge case was not pursued, and that was plainly indicated by the decision of the court. There the samples were selected by the exporter abroad and delivered by the United States consul to the general appraiser. The court said:

The law admits of no substitute processes other than it provides.

This does not hold that samples may not be taken or examined and the remainder of the merchandise released, but it means exactly what the court said, that you can not substitute a process "other than the law provides." The law does, however, section 2901, provide substitute processes, in that it empowers the appraiser, general appraiser, or Board of General Appraisers to send for such merchandise as is liable to be inspected or appraised, and section 2899 and the regulations provide a manner whereby all other mer-

chandise may be released. Article 896, Customs Regulations, 1908, meets this situation by empowering the collector to do so upon approval of the general appraiser or Board of General Appraisers before whom the question is pending by virtue of an appeal duly made.

The statement in the petition "that samples *duly authenticated* may be substituted for the public-store cases in reappraisement hearings seems to have been the opinion of the courts in various cases," is precisely in line with the holding of this court in the Tilge case; but the samples must be "*duly authenticated*." They must be authenticated by being selected from the importation and approved by the appraising officer having jurisdiction of the case and delivered by the importer in this country, who is under bond to so deliver them whenever duly demanded.

The petition further contends that if section 2901, Revised Statutes, is held mandatory and jurisdictional, that waiver and consent can in no sense be substituted for any of the requirements. There was neither waiver nor consent asserted in these cases. Due and strict observance of the statutory requirements in the absence of waiver, stipulation, or consent was the only issue presented and the only matter decided. This court, however, assumed in its opinion the validity of T. D. 10355, which expressly provided for the due substitution of samples in the place of the public-store packages or the packages the subject of reappraisement. That doctrine has been expressly approved by the highest court. *Converse v. Burgess* (18 How., 413); *Origet v. Hedden* (155 U. S., 228).

The rule, however, that jurisdiction can not be waived, and that consent can not confer jurisdiction, is in its strictness confined to jurisdiction of the *subject matter* and the *parties*, sometimes not to the latter. The rule is not always the same where jurisdiction is a matter of *procedure* when the subject matter and parties are properly before the tribunal.

The courts have held that *procedure to acquire jurisdiction of the parties* may be waived by the appearance of the parties themselves. This is true even in tax sales and other procedure *in invitum*. The mandatory procedure to acquire jurisdiction of the person is waived by voluntary appearance. When a method of procedure is made jurisdictional by reason of being mandatory, there are innumerable decisions supporting the doctrine that such jurisdiction may be waived and the legal requirement stipulated.

The criterion between mandatory and directory statutes is that the former does and the latter does not conserve an advantage, right, or interest. It uniformly lies within the power of one or both parties at interest to waive or stipulate away an advantage, right,

or interest. If the parties can waive their entire rights by not appearing they can waive an incident to those rights after appearance. That seems axiomatic. The rule as stated by Brown upon Jurisdiction, sections 17 and 18, is as follows:

SEC. 17. * * * But there are some matters that are jurisdictional which may be waived. * * * and the rule may be laid down that if a party entitled to complain of the want of jurisdiction for any cause neglects to do so, and takes subsequent steps in a court having jurisdiction inconsistent with an intent to take advantage of the want of power below and permits a judgment on the merits to be rendered, he is bound thereby.

SEC. 18. * * * So also where some personal privilege belongs to the defendant in a case, or some matter that he must plead or raise by motion or demurrer in order to bring it before the court and show the want of jurisdiction, then the defendant waives it by not raising the question.

So in innumerable cases it has been held that where jurisdiction is conferred by statute upon courts of law, if a court of equity having jurisdiction of the subject matter proceeds by consent of the parties, procedure at law may be waived and jurisdiction in the court of equity be conferred by waiver or consent. *Tyler v. Savage* (143 U. S., 79); *Burton v. Platter* (53 Fed. Rep., 901); *Kilborn v. Sunderland* (130 U. S., 505); *Lewis v. Luckett et al.* (221 U. S., 554).

We make these remarks solely in reply to statement in the petition that it *necessarily* follows from section 2901 being held mandatory as to procedure that waiver, consent, or stipulation can not be substituted for any of its requirements. What would or would not constitute such in any particular case is and was not before the court and is not here decided.

The dilemma presented under the law of the goods passing entirely out of the customs custody within the time allowed for the collector to appeal (60 days) presents no novel situation. Prior to August 5, 1909, that time was only limited to what was "reasonable." That it was a situation constantly defeating reappraisement called by collectors at late days and not one presented by any decision of this court is within the knowledge of all familiar with customs practice and witnessed by the decisions of the Supreme Court more than 20 years since. See *Beard v. Porter* (124 U. S., 437).

That presents a matter of legislation which this court did not create and can not remedy, and we assume from its long existence one which the Congress has never deemed of sufficient moment for correction save as it might be affected by the limitation placed upon the time within which the collector may appeal by the act of 1909.

The court is of the opinion it did not err; that no modification of the opinion is warranted; and that the opinion makes no modification of the long-established practice and regulations in the customs matter

Petition *denied*.

BENJAMIN IRON & STEEL CO. v. UNITED STATES (No. 411).¹

OLD STEEL RAILS NOT SCRAP.

To bring old steel rails within the provisions of paragraph 118, tariff act of 1909, the burden is on the importer to show that the importation is not only of scrap steel, but that it is such scrap steel as to constitute "waste or refuse iron or steel fit only to be remanufactured by melting." The evidence in the record falls short of showing the shipment was of this character; it was properly held dutiable under paragraph 126, tariff act of 1909.

United States Court of Customs Appeals, May 31, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23664 (T. D. 30768)

[Affirmed.]

Shire & Jellinek (Vernon Cole of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

The Benjamin Iron & Steel Co. imported at the port of Buffalo, N. Y., 25 carloads of steel rails purchased in Canada from the Provincial Steel Co. The importation was classified by the collector as steel rails and assessed for duty under paragraph 126 of the tariff act of August 5, 1909, which reads as follows:

126. Railway bars made of iron or steel, and railway bars made in part of steel, T rails and punched iron or steel flat rails, seven-fortieths of one cent per pound; railway fish-plates or splice-bars, made of iron or steel, three-tenths of one cent per pound.

The importer objected to the classification and duty assessed and claimed in his protest duly filed that the wares were scrap steel rails fit only for remanufacture by melting, and therefore dutiable under paragraph 118 of the act, which reads as follows:

118. Iron in pigs, iron kentledge, spiegeleisen, and ferro-manganese, two dollars and fifty cents per ton; wrought and cast scrap iron, and scrap steel, one dollar per ton; but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel fit only to be remanufactured by melting, and excluding pig iron in all forms.

The Board of General Appraisers overruled the protest and the importers appealed.

Only one question is raised by the appeal and that is: Are the steel rails scrap steel; that is to say, waste or refuse steel fit only to be remanufactured by melting?

On the hearing before the board the importer and three witnesses gave testimony in support of the protest. Giving to their testimony all the weight to which it is justly entitled it establishes at most that the importation is one of old steel rails which are so broken, worn, and damaged as to be unfit not only for the uses for which they were

¹ Reported in T. D. 31677 (20 Treas. Dec., 1259).

originally manufactured, but also for the secondary purpose and less exigent needs of contractors' or industrial railways. Steel rails in such a condition, even if it be accepted that they are scrap steel in the ordinary sense of the term, do not by virtue of that fact alone fall within the provisions of paragraph 118. To give the rails the benefit of that paragraph and to make them dutiable thereunder they must not only be scrap steel or scrap iron, but such scrap steel or scrap iron as is "waste or refuse iron or steel, fit only to be remanufactured by melting." The burden was on the importer to show not only that the classification to which he objected was erroneous, but that the classification which he claimed in his protest was correct. *Fisk v. Seeberger* (38 Fed. Rep., 718-719), *Walker v. Seeberger* (38 Fed. Rep., 724, 726), *Strakosh v. United States* (1 Ct. Cust. Appls., 360; T. D. 31453), *In re Herter Bros.* (53 Fed. Rep., 913), *Davies v. Arthur* (7 Fed. Cas., 43). To sustain his protest it was not enough to show that the wares which he imported were old, worn, rusty, broken steel rails of varying lengths or that they had been discarded as unfit for their original or any similar purpose or even that they were unfit for any use in their imported condition without further manufacture. If he wished to bring the importation within the meaning of the paragraph under which he claimed it was properly dutiable, it was incumbent on him to go further than all that and to establish by a preponderance of evidence that the scrap steel rails were waste or refuse steel fit only to be *remanufactured by melting*. We think that the evidence contained in the record falls short of showing that the shipment was of that character. The fact that the rails were purchased from the Provincial Steel Co. of Canada, which bought rails fit for rerolling and sold those unfit for that purpose, can hardly be regarded as proof that the rails sold by it to the appellant were actually unfit for rerolling and much less as proof that they were fit only to be *remanufactured by melting*. True, the importer does positively testify that the wares were fit for melting purposes only. As to that fact, however, we are not satisfied from the record that he was a witness qualified to speak. It appears from his testimony that he is engaged in the business of buying and selling iron and steel of all kinds, but it does not appear that he is a manufacturer of steel or that his experience or the nature of his business is such as to give him a knowledge of all the manufacturing uses for which scrap steel rails are commercially available. Moreover, the following evidence which he gave would seem to indicate that he was uncertain as to whether the rails or some of them might not be fit for rerolling:

Q. Take the pieces only 4 feet in length, could they be rerolled into bars?—A. *I don't know. We usually sell them over 5 feet for rerolling.*

* * * * *

Q. Do you ever sell to mills that do heat and reroll as distinguished from remelting?—A. Yes, sir.

Q. From your knowledge are you able to state whether or not this particular material is unsuitable for such use?—A. I should say they are not suitable for such use.

Q. Why?—A. Because they were split heads, broken heads, and short lengths.

Q. That wouldn't prevent them from being reheated and redrawn?—A. Yes, sir.

Q. Why?—A. They have to have a rail that is almost perfect for rerolling; *it would depend a good deal on what rerolling purpose they were to be used for.*

* * * * *

Q. There isn't any piece of scrap iron that could not be made over into something by spending a lot of labor on it?—A. Yes, sir; almost any scrap iron can be used for rerolling purposes.

Q. Horseshoes, nuts, and bolts?—A. Yes, sir; and spikes or anything of that kind can be rerolled.

Furthermore, his testimony to the point that the importation was fit only for remelting is somewhat weakened by the testimony of two of his witnesses, Frank Lehanan and Jedo Gould. One of them is apparently engaged in the same line of business as the appellant and the other is a manufacturer of castings and a remelter. These witnesses seemingly have had as much experience in the steel and iron business as the importer. So far as the record discloses, their opportunity for knowing whether the rails were fit commercially for one manufacturing use or another was as good as that of the importer. Yet neither of them confirmed him, and both of them expressly declined to state that the rails were unfit for any manufacturing purpose other than that of remelting. One witness, Edwin G. Taylor, did corroborate the importer in this particular. Mr. Taylor's testimony, however, was limited to the 4-foot rails purchased by the Snow Steam Pump Works and is open to the objection that his knowledge and experience of manufacturing scrap, waste, or refuse steel is not shown to extend beyond that of melting. Whether he knew anything about heating and rolling or rerolling such steel or the commercial practicability of heating and hammering it into tools does not appear. His general experience may have been such as to make him conversant with all the methods of manufacturing scrap steel and with the kinds of steel commercially suitable for each method, but we can not assume that he was so informed simply from the fact that he was a remelter, especially as the witness Gould; another remelter, stated that he was not familiar with rolling mills or rolling-mill plants and that he could not say whether there was anything about the rails which would unfit them for further manufacture by heating and rerolling without remelting.

As scrap-steel rails may be remanufactured without melting by heating and rerolling or by heating and hammering, the testimony of witnesses acquainted with those processes of remanufacturing scrap steel should have been produced to show that the rails imported were commercially unfit for such methods of manufacture. Testimony of that kind not having been produced it must be held that the appellant

has failed to sustain his protest by competent evidence showing the unfitness of his wares for any other purpose than remanufacture by melting.

Whether the rails are classifiable as waste not specially provided for under paragraph 479, or as old junk under paragraph 600, it is unnecessary to decide. That issue was not raised by the protest, and to the claims of the protest the importer must be confined in a proceeding to recover duties which he alleges have been unlawfully imposed and exacted. *Davies v. Arthur* (7 Fed. Cas., 43; affirmed in 96 U. S., 148).

Neither can the importer be permitted to amend his protest after the time provided by law for making it has expired. *In re Sherman* (49 Fed. Rep., 224; affirmed in 55 Fed. Rep., 276).

The decision of the Board of General Appraisers is *affirmed*.

BOKER *v.* UNITED STATES (No. 426).¹

NICKEL-PLATED IRON OR STEEL SHEETS, WELDED BY ROLLING.

A thin plate of iron or steel, common or black, three-eighths of an inch thick, on which a thin sheet of nickel or copper of the same dimensions has been laid and then subjected to a process of hot rolling to weld the metals together, is not to be classified as a sheet of iron or steel; and since in thickness it exceeds No. 10 wire gauge, it was not dutiable under either paragraph 126 or paragraph 131, tariff act of 1897, but under paragraph 193 of that act as "manufactures of metal."

United States Court of Customs Appeals, May 31, 1911.

APPEAL from United States Circuit Court for Southern District of New York. 180 Fed. Rep., 959 (T. D. 30841); G. A. 6613 (T. D. 28230).

[Affirmed.]

Walden & Webster (Howard T. Walden of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The importations involved in this case were made under the tariff act of 1897. The appellants brought into this country large shipments of certain flat metal sheets of various dimensions, composed of iron or steel faced with nickel or copper.

The collector classified these importations as "manufactures of metal" under the provisions of paragraph 193 of the act, and assessed them for duty at 45 per cent ad valorem.

The importers filed their protest, and contended that the merchandise fell within the provisions of paragraphs 131 and 132 as sheets of iron or steel thinner than No. 10 wire gauge, valued at 3 cents per pound or less, coated with nickel or copper, and was dutiable at seven-

¹ Reported in T. D. 31678 (20 Treas. Dec., 1262).

tenths of 1 cent a pound under the first paragraph, with two-tenths of 1 cent a pound additional thereto under the second paragraph.

The protest was heard upon evidence by the board and was overruled. The case was thereupon appealed to the United States Circuit Court for the Southern District of New York, where additional testimony was taken. Upon consideration the court affirmed the decision of the board, and the appellants now pray for a reversal of that judgment.

There is very little if any controversy concerning the facts in this case. The merchandise is manufactured in Germany. A single plate of iron or steel, common or black, three-eighths of an inch thick, is used for the body of the article. A thin sheet of nickel or copper of equal length and breadth is then laid upon the iron or steel, and these metal layers are together subjected to a process of hot rolling. This welds the metals together and greatly reduces their combined thickness.

As already stated, the original iron or steel body is three-eighths of an inch thick. The layer of nickel or copper varies in thickness from $1\frac{1}{2}$ to 20 per cent of the iron or steel. At the lesser of these proportions such a nickel layer, according to the testimony, would be about three times as valuable as the iron or steel plate to which it was welded. After the rolling process the metal sheets vary in combined thickness from 15 to 70 one-thousandths of an inch. The sheets vary in length and breadth to suit the demands of buyers. The importer testifies that the trade knows these articles variously as iron or steel sheets nickel plated, nickel covered, or nickel coated. As imported the sheets are valued at more than 3 cents a pound for the combined metals, but less than 3 cents a pound for the constituent iron or steel if taken alone.

With these facts as the premises the question is whether the importation falls within the provisions of paragraphs 131 and 132 of the act, which read as follows:

131. Sheets of iron or steel, common or black, of whatever dimensions, and skelp iron or steel, valued at three cents per pound or less, thinner than number ten and not thinner than number twenty wire gauge, seven-tenths of one cent per pound; thinner than number twenty wire gauge, and not thinner than number twenty-five wire gauge, eight-tenths of one cent per pound; thinner than number twenty-five wire gauge and not thinner than number thirty-two wire gauge, one and one-tenth cents per pound; thinner than number thirty-two wire gauge, one and two-tenths cents per pound; corrugated or crimped, one and one-tenth cents per pound: *Provided*, That all sheets of common or black iron or steel not thinner than number ten wire gauge shall pay duty as plate iron or plate steel.

132. All iron or steel sheets or plates, and all hoop, band, or scroll iron or steel, excepting what are known commercially as tin plates, terne plates, and taggers tin, and hereinafter provided for, when galvanized or coated with zinc, spelter, or other metals, or any alloy of those metals, shall pay two-tenths of one cent per pound more duty than if the same was not so galvanized or coated.

It will be observed that paragraph 131 provides for sheets of iron or steel, common or black, of whatever dimensions, thinner than No. 10 wire gauge, valued at 3 cents per pound or less, and that paragraph 132 provides for an additional duty upon all such articles if coated with other metal.

The appellants contend that the imported articles fall within these terms; that they are sheets of iron or steel, common or black, thinner than No. 10 wire gauge, valued at 3 cents per pound or less, and coated with other metal. The Government denies each of these allegations.

It seems clear from the foregoing statement that the articles in question are not sheets of iron or steel when they arrive in this country and that they could not have been so described at any time in their history. At importation they were not such sheets because they were combined with other metals, and at the time when such combination was effected they were not such sheets because their thickness took them out of that class and placed them within the class of plates. Paragraphs 126 and 131 both provide, in effect, that such a piece of iron or steel shall be held to be a sheet if thinner than No. 10 wire gauge, but if not thinner than No. 10 wire gauge it shall be held to be a plate. The metals in question when combined with copper or nickel by the rolling process were three-eighths of an inch thick. It is conceded that this thickness substantially exceeds No. 10 wire gauge. The articles at the time of their union with other metals were therefore not sheets but plates. If the welding process may properly be called "coating" the iron metals, it was not sheets that were so coated, but plates. Appellants therefore fail in their contention that the imported articles were sheets of iron or steel, common or black, for they were not such sheets in their condition at importation nor were they such sheets in their condition when covered by the other metals.

The process whereby the copper or nickel is added to the iron or steel has been already described. This process does not seem to come within the provision of paragraph 132 for cases of iron or steel sheets "galvanized or coated" with other metals. It is not claimed to be a process of galvanization, but appellants contend that it is a process of coating. However, the welding together of pieces of metal by a process of hot rolling such as was pursued in this case does not seem to come within the meaning of the word "coating." And especially is that true where, as in this case, the word is used in association with "galvanized," which expresses a method of covering one metal by another wholly unlike the process of welding them together by pressure.

Inasmuch, therefore, as the imported articles fail in two essential particulars to meet the requirements of paragraphs 131 and 132, the collector was right in classifying them under paragraph 193. And the judgment of the Circuit Court to the same effect is therefore *affirmed*.

UNITED STATES *v.* CONTINENTAL COLOR & CHEMICAL CO. (No. 543).¹

HYDROXIDE OF CHROME, A CRUDE SUBSTANCE USED IN DYEING AND TANNING.

Hydroxide of chrome, as here imported, in the state of its first production, unrefined and unfit for use for dyeing or tanning without being subjected to refining processes, was not dutiable as a chemical compound under either the tariff act of 1897 or that of 1909, but under each act was free of duty as an article in a crude state used in dyeing or tanning not specially provided for.

United States Court of Customs Appeals, May 31, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7132 (T. D. 31102).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Curie, Smith & Maxwell (*W. Wickham Smith* and *Thomas M. Lane* of counsel) for the appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff acts of 1897 and 1909 the appellees imported into this country certain merchandise consisting of hydroxide of chrome. This is a chemical compound produced in Germany, and in the record it is otherwise variously denominated oxyhydrate of chrome, chrome oxyhydrate, and chrome oxyd.

The collector classified the article as a chemical compound within the meaning of paragraph 3 of each of the acts, and therefore assessed it for duty at the rate of 25 per cent ad valorem.

The appellees duly filed their protest to this ruling, and contended that the article should be admitted free of duty according to paragraph 482 of the act of 1897 and paragraph 499 of the act of 1909 as an article in a crude state used in dyeing or tanning, not specially provided for in the act.

The protest was duly heard upon evidence by the Board of General Appraisers, and the collector was reversed. The Government now prays for a reversal of that decision.

As has been stated, the merchandise in question was entered in part under the act of 1897 and in part under the act of 1909. The provisions of the two acts are substantially identical so far as this case is concerned, and for convenience we will refer to the act of 1897 alone in giving our decision upon the issue involved.

Paragraphs 3 and 482 of the act of 1897 read as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

482. Articles in a crude state used in dyeing or tanning not specially provided for in this act.

¹ Reported in T. D. 31679 (20 Treas. Dec., 1265).

It is of course conceded that the substance in question is a chemical compound and would be controlled as such by paragraph 3, unless it also comes within the terms of paragraph 482 as an article in a crude state used in dyeing or tanning not specially provided for in the act. If the article is described by both paragraphs, then paragraph 482 would be dominant, because it is obviously the more specific of the two.

Paragraph 482 provides for articles in a crude state used in dyeing or tanning not specially provided for in the act. The appellant contends that this article as imported is not "in a crude state" and therefore does not fall within the class defined by the paragraph, even though it is used in dyeing and tanning. This presents the single question which is decisive of the issue.

The process which results in the production of hydroxide of chrome is fully described in the record. In the manufacture of anthraquinone from anthracene the anthracene is heated with a solution containing bichromate of sodium and sulphuric acid. The anthraquinone is thus produced in the form of a solid mass, which is filtered off, leaving a heavy, greenish liquid remaining. This liquid contains sulphuric acid and also the products formed from the bichromate of sodium. The liquid is thereupon treated by the addition of a watery mixture of magnesium oxide, which precipitates the chrome in the form of hydroxide of chrome—the substance in question in this case. This is filtered off, washed and packed, and imported. As thus packed it is a paste containing a large percentage of chromium oxide, a less percentage of chromium sulphate, some traces of arsenic, iron, lead, and antimony, and is about two-thirds water. About 1 per cent of the substance is composed of accidental impurities, such as chips and fibers.

The substance thus produced is used in this country as a mordant in the printing of textile fabrics and in tanning. In neither case, however, is it used in the form in which it is imported. For use in dyeing it is first treated with acetic acid and thereby converted into acetate of chrome. For use in tanning it is treated with sulphuric acid, forming a sulphate of chrome. In each case the resulting product is a different chemical compound from the hydroxide of chrome. That article as imported could not be used by dyers or tanners; it requires first to be treated as above stated, whereby it is converted chemically into new and different combinations. These new combinations only are the substances used in dyeing and tanning.

These facts are very clearly set out in the testimony and are indeed uncontradicted. They seem to furnish an answer to the question whether or not the importation is an article in a crude state used for dyeing or tanning. The article as imported is certainly in a crude state in two aspects. First, the article itself is in the state of its first production, without being refined by additional treatment applied for that purpose. In this condition it is mixed with various impuri-

ties. This is worthy of notice, although it may not be the controlling consideration within the purview of paragraph 482. The filtering and washing process described in the testimony had no effect on the article itself other than "to get it by itself." And second, it is an article in a crude state within the meaning of the paragraph, because, as imported, it is not in a condition fit for use in dyeing or tanning, but it is only a raw material which is to be converted by further treatment into other articles fit for such use. This is the important aspect in which the article may be said to be in a crude state. The paragraph treats of materials which are used in dyeing and tanning. The importation is simply a raw material in its relation to those uses and is therefore in a crude state in that respect. To prepare it for such uses other chemical elements must first be added to it, so that when finally used for such purposes it presents a different chemical combination.

In the Kuttroff case, cited by the appellant, the substance there in question, namely, chrome alum, was "refined," was "prepared by artificial process," and was also "in a complete form needing no other preparation for its use;" all of which was stated by the board in its decision of the case.

The decision of the board in the case at bar is therefore *affirmed*.

UNITED STATES *v.* RICHTER (No. 544).¹

1. A MANUFACTURE MAY BE MATERIAL FOR ANOTHER MANUFACTURE.

Ordinarily a manufactured article takes a different form, or at least subserves a purpose different from that of the original materials out of which it is made and usually takes a different name. That does not mean, however, that its usefulness as a material has necessarily ended and that as a manufacture it can not serve the purpose of material for some other manufacture.

2. MANUFACTURES OF FURS USED AS MATERIAL.

According to the evidence, the importation was of pieces of dressed natural sheepskin sewed into rugs and known to the trade as rugs. It appears they are used as material for making finer rugs or other articles of fur. They are further advanced than dressing and dyeing and were properly dutiable as manufactures of furs further advanced than dressing and dyeing under paragraph 439, tariff act of 1909.

United States Court of Customs Appeals, May 31, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7122 (T. D. 31043).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Brown & Gerry for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified certain dressed sheepskins, sewed into rectangular shapes, 64 inches long by

¹ Reported in T. D. 31680 (20 Treas. Dec., 1267).

30 inches wide, as manufactures of fur, and assessed them for duty at 35 per cent ad valorem under paragraph 439 of the tariff act of August 5, 1909, which reads as follows:

439. Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem; articles of wearing apparel of every description, partly or wholly manufactured, composed of or of which fur is the component material of chief value, fifty per centum ad valorem. Furs not on the skin, prepared for hatters' use, including fur skins carotred, twenty per centum ad valorem.

The importer objected to the classification and the duty assessed and among other grounds of protest set up that the goods were dutiable at 20 per cent ad valorem under paragraph 439 either as furs dressed on the skin, not repaired, and not advanced further than dyeing or at the same rate as partly manufactured articles not provided for under paragraph 480, the part of which relevant to the case reads as follows:

480. That there shall be levied, collected, and paid * * * on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

A majority of the Board of General Appraisers decided that the merchandise was unquestionably fashioned into the form of rugs and as such were manufactures of fur, but that they did not belong to the group of manufactures of furs described in that portion of the paragraph under which they were classified and assessed for duty, for the reason that they were not prepared for use as material. As there was no general provision for manufactures of fur in the tariff act of 1909, the majority of the board felt obliged to hold that the goods were dutiable at 20 per cent ad valorem, either as furs dressed on the skin or as nonenumerated manufactured articles. The minority of the board was of opinion that the importation was one of fur skins in the form of unfinished rugs temporarily sewn together for convenience in transportation and to guard against the inclusion of undersized or defective skins in the shipment; that the ultimate use of the unfinished rugs was the manufacture of carriage robes, the outside of fur garments, and similar purposes; that the so-called rugs had not been "prepared for use as materials, inasmuch as the flanks and defective skins have to be discarded, the skins matched, and then permanently sewn to fit them for such use," and that the goods were dutiable as furs dressed on the skin, not advanced further than dyeing, at 20 per cent ad valorem.

From the decision of the board the Government appealed.

The appraiser returned the merchandise as "pieces of dressed natural sheepskins which were sewed into rugs," dutiable as manufactures of fur. The evidence produced by the importer on the hearing was to the effect that the wares in question were dressed pieces of

sheepskin, sewed together in China in the form of rugs for convenient shipment and to give to the rugs a definite size, and that they were known to the trade as rugs. It appears that on arrival in this country such rugs are taken apart and the poor pieces, if any, cut out. The good pieces are rematched, if necessary, joined together by resewing, and either lined and formed anew into rugs or after resewing are converted into carriage robes, overcoats, or other things of that nature. One of the witnesses for the importer testified that the articles as imported can be used as rugs after resewing.

The goods in this case are made up of furs dressed on the skin and their nature is such that if dutiable at all under the provisions of paragraph 439 of the tariff act of 1909 they must fall within one of the following classes therein specified, namely:

(1) Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; or

(2) Manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem.

The importer contends, first, that they are not manufactures of furs; second, that they are not further advanced than dressing and dyeing; third, that they have not been prepared for use as material; and fourth, that they are not plates, linings, and crosses which are manufactures of fur.

In support of the first point counsel for appellants argue that the rugs are at best furs manufactured, and that within the principle laid down in *Dejonge v. Magone* (159 U. S., 562, 568) and *Hartranft v. Wiegmann* (121 U. S., 609, 615) they can not be regarded as manufactures of fur. The cases cited do hold that to constitute a manufacture the material must be converted into a new and different article having a name, character, or use distinct from that of the original substance subjected to manufacturing processes. It will be noted, however, that they do not go so far as to say that for a manufacture it is necessary that the original material should pass from its condition as a material into a finished article not destined as the material for something else. To so limit the meaning of "a manufacture" would bring about the odd result of making the language in paragraph 439, "manufactures of furs * * * when prepared for use as material" a contradiction of terms. Ordinarily a manufactured article takes a different form, or at least subserves a purpose different from the original materials out of which it is made and usually it takes a different name. *Tidewater Oil Co. v. United States* (171 U. S., 210, 216). That does not mean, however, that its usefulness as a material has necessarily ended and that as a manufacture it can not serve the purpose of material for some other manufacture. Iron ore is converted into iron; iron is turned into steel; and steel into thousands of articles of industrial usefulness. The iron is a manu-

facture of the ore, the steel a manufacture of the iron, and a watch spring a manufacture of the steel. "The finished product of one manufacture thus becomes the material of the next in rank." *Tide-water Oil Co. v. United States* (171 U. S., 210, 217). The goods in question are not mere pieces of dressed fur thrown together without purpose or design. The original furs dressed on the skin have been cut into pieces, not at random, but in pursuance of a definite result to be achieved. The sample shows that these pieces have been matched, that they have been fitted to place, and then sewed together into the definite form of an unlined rug. Although the basting or rough tacking of the pieces in place would have served the purpose of holding them together for mere convenience of transportation, the pieces are something more than basted and tacked together. The pieces of the sample are very firmly joined one to the other with strong thread, and the stitching can be considered temporary only in the sense that it is removed and a more effective style of stitch substituted. As imported the articles have all the appearance of rugs, and as a matter of fact bear that name in the trade. Indeed, if the sample may be considered fairly representative of the goods, they are serviceable as rugs as they stand, although it appears that they are to be used as material for making finer rugs or other articles of fur. That the sewing is not up to domestic standards, that the articles are ripped apart after importation, that they are re sewed after removing poor pieces and rematching, that they are converted or may be converted into carriage robes or coats, does not alter the fact that the goods are actually rugs when they arrive and that the furs of which they are made have been advanced by processes of manufacture into a definite article which is something more than fur and which has achieved the dignity of another name. If the circumstances upon which counsel for the importer base the contention that the articles are not manufactures of fur were accepted as governing factors in reaching a classification of the merchandise, it would seem that the character of an importation is to be determined not by its nature and form when imported but by the quality of workmanship and by the processes of manufacture to which it is subjected after it arrives. With such a rule of tariff construction finally established it is just a bit difficult to see how a poorly sewed, poorly fitted silk dress, ornamented with badly selected silk laces, could be classified as wearing apparel should the importer satisfactorily prove that it was the custom to rip out the deficient sewing and either re sew it into a better-fitted dress with more appropriate laces or utilize the materials for some other confection. We are unwilling to depart from the general rule that the condition of goods at the time of importation is the condition which determines their classification for tariff purposes, and therefore we are inclined to uphold the finding of the majority of the board

that the rugs are manufactures of fur in the sense that out of the furs a new article has been evolved with a different name and a use for which the original fur skin unprocessed was not commercially available, but not in the sense, however, that as such manufactures of fur their commercial usefulness for the making of some other article has ended.

But are the rugs manufactures of fur *prepared for use as material*? That they are suitable as material for the making of lined rugs, carriage robes, and fur coats, and are chiefly used for that purpose, seems to be established by the two witnesses produced on the hearing, both of whom testified on behalf of the importer. It is contended, however, that the goods are not *prepared for use as material*; that whatever preparation the merchandise has received has been given wholly for convenience in transportation, and that the articles must be taken apart, poor pieces cut out, and the good ones rematched and resewed before they can be used for making rugs or anything else. We think the contention is a little broader than is justified by the whole evidence. The rugs are taken apart and they are resewn, but poor pieces are not always found, and neither is it always necessary to rematch the pieces, although in many cases such a course is pursued. The sample received in evidence is that of a rug much more strongly sewed than mere convenience of transportation required. The pieces composing it seem to be well matched and if some of them are poor in quality that fact is not disclosed by the evidence. Neither is it apparent to the eye of the layman; but whether the original sewing is removed and the pieces, without changing their relative position, are resewed into a better-stitched rug, or whether the pieces are rematched and resewed into a better-matched and a better-stitched rug, or whether poor pieces are replaced by others of better grade and resewed with those remaining into a better quality of rug, or whether the pieces are made up into a carriage robe or other articles, the fact remains that the components of the rugs as they came into the country were not promiscuous bits of dressed fur, but parts of a whole, cut to shape, fitted one to the other, joined together into a definite article, namely, a rug, which can be and is used in the trade as material to make better rugs. We do not think that either the evidence or the sample justifies us in inferring that the constituent parts of the rug are so badly matched and so mixed in grade that they have been sewed together as pieces of waste or refuse fur. Inferior pieces and poorly matched pieces may be and are in many cases found, but that condition affects the quality of the article and not its status as a rug or its availability as material prepared in some degree for lined rugs or for carriage robes, which do not differ substantially from rugs.

The goods which are the subject of this appeal are made of dressed fur skins which have not been dyed, and the point is made that they

are not further advanced than dressing and dyeing. We think that the phrase "further advanced than dressing and dyeing," as used in paragraph 439, was intended to mark a step in the process of manufacture, and that whether furs have been so advanced is to be determined not by whether they have been actually dressed and dyed, but by whether they have passed beyond the dressing and dyeing stage in their manufacture. Furs may be and are made up into articles without dyeing them at all, in which case it would seem that they had gone beyond the dressing and dyeing period of their development. As already indicated, the furs utilized in making the rugs under consideration have lost their identity as mere furs. By processes of manufacture they have become articles of fur, namely, rugs, and are therefore, in our opinion, "manufactures of furs further advanced than dressing and dyeing."

The decision of the Board of General Appraisers is *reversed*.

CARLOWITZ *v.* UNITED STATES (No. 564).¹

PLATES, LININGS, AND CROSSES.

It was the evident purpose of the Congress by paragraph 439, tariff act of 1909, to distinguish between the completed article and the several grades of materials entering into its composition, and to impose on materials prepared for the use of furriers and other manufacturers of fur an intervening rate of duty, higher than the rate upon dressed skins that had theretofore been construed by the board as proper and applicable, and at the same time lower than the rate provided for manufactures made from such materials. The words "plates, linings, and crosses" are employed in that paragraph as words of extension rather than specification and the furriers' articles of the importation, whether dressed or dyed or not, were properly assessed at 35 per cent ad valorem under that paragraph.

United States Court of Customs Appeals, May 31, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7125 (T. D. 31085).

[Affirmed.]

Brown & Gerry for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal from a decision of the Board of General Appraisers is confined to the following protests, and description of goods covered by the same:

- Protest 397880, dressed and dyed kid skins temporarily sewn into the form of crosses.
- Protest 425072, dressed and dyed kid skins temporarily sewn into the form of crosses.
- Protest 401905, dressed and dyed kid skins temporarily sewn into the form of crosses.
- Protest 408554, dressed and dyed kid skins temporarily sewn into the form of crosses, and natural slink lamb skins temporarily sewn into the form of crosses.
- Protest 418703, dressed slink lamb skins temporarily sewn into the form of crosses.
- Protest 423305, dressed susliki skins temporarily sewn into the form of linings.

¹ Reported in T. D. 31681 (20 Treas. Dec., 1272).

This statement of subject matter is as given in appellants' brief with the exception of the last two, which are designated by appellants as "natural," but which we deem fairly within this record dressed skins. That condition, however, is not held controlling.

The controversy involves the construction and application of paragraph 439 of the tariff act of August 5, 1909, which is as follows:

439. Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem; articles of wearing apparel of every description, partly or wholly manufactured, composed of or of which fur is the component material of chief value, fifty per centum ad valorem. Furs not on the skin, prepared for hatters' use, including fur skins carotod, twenty per centum ad valorem.

The merchandise was assessed for duty under the second provision of that paragraph at 35 per cent ad valorem. The Government maintains this classification and assessment for dutiable purposes correct. The importers, appellants, maintain that the merchandise is properly dutiable under the first provision of that paragraph for furs dressed on the skin, etc., at 20 per cent ad valorem. The board overruled the protestants' claims and they appeal.

We think the intent of Congress will be better subserved by consideration of the entire paragraph. It bears evidence when considered in all of its framework and import of having been intended as a comprehensive provision levying duties upon fur articles at rates graded according to condition, commencing with the fur dressed on the skin and extending to and including articles of wearing apparel made up of such furs in the various degrees of manufacture. Whether the purpose was fully accomplished is not now in issue.

The first provision is—

Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem;

The second provision is—

manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem;

The third provision is—

articles of wearing apparel of every description, partly or wholly manufactured, composed of or of which fur is the component material of chief value, fifty per centum ad valorem.

The final provision is one covering merchandise akin to that covered by the first provision and levying thereon the same rate of duty, thus observing the classification of such merchandise according to rates of duty and condition in which imported.

The first provision relates to the goods as taken from the animal and dressed, but not further advanced than dyeing nor repaired.

The second is manifestly a material provision.

The whole framework of the paragraph and the language employed in the precise provision indicates that it is intended to embrace for dutiable purposes those materials which are prepared for use by, and usually sold to, manufacturers of fur articles.

Whilst the provision opens with the phrase "manufactures of furs," the subsequent limitations placed upon that phrase in that such shall be "further advanced than dressing and dyeing," and be such as are "prepared for use as material," indicate that the term "manufactures of furs" was not used by Congress with a view to including therewithin and making here dutiable only such things as arise to the dignity of manufactures of furs in the sense of articles completed, ready for final use, as distinguished from such manufactures constituting materials for further manufacture. It was a phrase used by Congress in connection with the subsequent limiting words to define by the entire expression a condition of merchandise upon which a rate of duty is levied, which, however, in fact had not reached a condition coming fully and completely within the term "manufactures of furs" in the sense last above stated. The provision transposed, it seems to us, essentially provides as if it read "materials prepared for use when made of furs further advanced than dressing or dyeing." This provision is tantamount to a description of the condition of merchandise constituting materials for and levying duties thereupon rather than an enactment assessing duties upon manufactures of that merchandise. That result is inherent from the very terms of limitation placed upon the phrase "manufactures of furs," as used in the statute.

In this sense Congress has attempted a gradation of rates and conditions provided in the paragraph in so far as it speaks. First, fur skins dyed. This would be practically as they come from the huntsman, including dyeing. Second, fur skins dressed and dyed and prepared for use as materials for the furrier or other manufacturer of furs. Third, certain manufactures of furs, to wit, articles of wearing apparel partly or wholly manufactured.

The phrase, "including plates, linings, and crosses," part of the second material provision, lends weight to this conclusion in that it plainly and admittedly includes classes of furrier's materials.

It is contended by the appellants that the words "plates, linings, and crosses," as here used, are not words of extension, but words of specification, and that each is modified by the preceding words "further advanced than dressing and dyeing," and that, therefore, only those plates, linings, and crosses can be included within this provision for dutiable purposes which are dressed and dyed, and which in the condition as imported are ready for use as material.

Whether phrases such as these, introduced by the word "including," in tariff provisions, are words of extension or specification has

been the subject of previous consideration by the courts. The determining rule in such cases has been, in a great measure, ascertained by an examination of the history and context of the particular provisions.

In *Hiller et al. v. United States* (106 Fed. Rep., 73), the United States Circuit Court of Appeals for the Second Circuit considered such a phrase. The language was that of paragraph 339 of the tariff act of 1897, which read:

339. * * * Embroideries and all trimmings, *including* braids. * * *

The court compared the provisions of the acts of 1894 and 1897 in regard to the classification of braids, and therefrom deduced the intent of Congress. The court held that because the word "braids" was omitted from the paragraph of the act of 1897, which corresponded to the paragraph of the act of 1894 levying a lower duty upon braids *eo nomine*, and so inserted it in paragraph 339 of the tariff act of 1897 levying a higher duty, the corresponding paragraph to which in the act of 1894 did not include "braids," indicated the intention upon the part of Congress to advance for dutiable purposes at the rate therein levied all braids in the act of 1897, and that hence the words were used in that paragraph as words of extension, and not specification limited by the language *ejusdem generis* in said paragraph 339.

Again, in *Goldenberg Bros. & Co. v. United States* (130 Fed. Rep., 108), a similar question arose with reference to the use of the words "articles of wearing apparel of every description, *including* neckties or neckwear" in paragraph 314 of the tariff act of 1897. The court there based its conclusion upon the presumed intent of Congress to levy an equal rate of duty upon articles of the same composition and character, to wit, cotton wearing apparel, and, the context so necessitating, held that the words "were intended as words of expansion rather than as words of restriction."

The history of this legislation leads to the same conclusion, and is instructive of the Congressional intent. There has been a persistent and successful effort upon the part of the importers under various preceding tariff acts to have plates, linings, and crosses, and materials used in the manufacture of furs sewed together temporarily with a view to holding the skins in place and protecting them, though known as "linings," etc., classified for dutiable purposes as "furs dressed on the skin but not made up into articles," which was substantially the language of the previous act. See G. A. 5457 (T. D. 24746). It was held, however, previous to the enactment of the act of 1909, that if these "linings" were permanently sewed into the forms adapted for the lining of garments they were dutiable as manufactures of furs.

See Abstract 12633 (T. D. 27572). See also *Mavtner v. United States* (84 Fed. Rep., 155).

It was the evident purpose of Congress by paragraph 439 of the act of 1909 to distinguish between the completed article and several grades of materials entering into its composition, and to provide an intervening rate of duty upon materials prepared for the use of furriers and other manufacturers of furs higher than that upon the dressed skins, which rate had heretofore been construed the applicable one by the board of general appraisers, and at the same time lower than the rate provided upon the manufactures made from such materials.

Among the articles which had been specifically the subject of this contention were linings, which are in exactly the same category as the crosses and the plates, the subject of this litigation, and which in description and name correspond to the articles the subject of the stated litigation and construction. When Congress approached this subject of legislation, therefore, it was confronted by a construction of the law that these more advanced classes of materials, known by certain specific trade names, were classified at the same rate of duty with the less advanced classes, to wit, furs dressed on the skin. In this view we see no escape from the conclusion that by the use of the specific words "including plates, linings, and crosses," Congress was reaching out for these "linings," the subject of previous litigation, and kindred materials named, and applying thereto a specific rate of duty, and that in so doing it used the words as used in trade and hence as disclosed by this record as words of extension rather than specification.

We are, therefore, of the opinion that plates, linings, and crosses provided for in this paragraph, which are conceded well-known articles in the furriers' trade, and the trades of other manufacturers of furs, as these are admitted to be, are included within this provision of the law, whether or not dressed or dyed.

It seems to us fairly established by this record that they are materials prepared for the use of the furrier and other manufacturers of furs.

The testimony, and particularly the samples, in this case indicate that while the sewing is of flimsy character, nevertheless much time and labor has been devoted to the matching and cutting of the different pieces making up these importations. This undoubtedly involved the destruction of other parts of the skins so cut and in the samples before us resulted in perfectly matched and selected crosses and linings which the record shows are furriers' materials, well known by that name in the trade. These employments and services upon the particular merchandise would undoubtedly equalize, if not exceed, the cost of dyeing or dressing which would be necessary incidents to the other goods embraced within this material provision of the paragraph at the rate of 35 per cent ad valorem. There results from this construction, therefore, no lack in uniformity of duties.

Indeed, under the testimony in the record that when these linings and crosses go into ultimate use into the garment or rug that some rearrangement of the integral skins is necessary, which would undoubtedly be true according to the demands of the particular garment and the parts thereof to be made of the particular rug, the flimsy character of the sewing adds to that value as materials for the furrier's use, because the tearing apart becomes a labor of less cost and the operation less likely to injure the fur. So that it is not without reason that the flimsy character of the sewing itself conduces to the quality of the merchandise as a material prepared for use.

We are of the opinion that the merchandise was properly assessed for duty, and that the decision of the Board of General Appraisers should be *affirmed*.

UNITED STATES v. BURKHARDT (No. 610).¹

SEALSKIN IN ITS NATURAL SHAPE, DRESSED AND REPAIRED.

Sealskins that have been "repaired" can not be taken for dutiable purposes to come within the first clause of paragraph 439, tariff act of 1909, and though "repaired" this will not constitute them manufactures of furs designated by the second clause of that paragraph; there is no *eo nomine* provision applicable and the importation is dutiable under paragraph 480 of the act as an unenumerated article, manufactured in whole or in part.

United States Court of Customs Appeals, May 31, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24694 (T. D. 31255).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Brown & Gerry for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The issue involved here is whether sealskin in its natural shape, but dressed and repaired, is dutiable under either of the first two clauses of paragraph 439, or under paragraph 480 of the tariff act of August 5, 1909. We quote the first two clauses of paragraph 439 and the entire paragraph 480.

439. Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem; * * *

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

¹ Reported in T. D. 31682 (20 Treas. Dec., 1277).

The sealskins were by the collector held dutiable under the second clause of paragraph 439.

The importer protested, claiming the merchandise was entitled to free entry under appropriate paragraphs of the tariff act, and also that it was dutiable at 20 per cent ad valorem under the first clause of paragraph 439, or, alternatively, at 20 per cent ad valorem under paragraph 480.

The questions raised by the protest were submitted to the Board of General Appraisers upon the papers in the case and a sample sealskin. Thereupon the board found as follows:

Examination of the sample shows it to be a complete sealskin, dressed and repaired. There is no evidence whatever of any special preparation of it for use as material. In fact, it is more accurately described under the second clause of the appraiser's report as "furs dressed on the skin, repaired."

and sustained the protest and held the goods dutiable at 20 per cent ad valorem under the first clause of paragraph 439.

We are unable to agree with the conclusion of the board, that these sealskins are dutiable under the first clause of the paragraph.

Both parties assume and the board found that the skins had been repaired. Having been repaired, they are expressly excluded from the first clause of paragraph 439, which, by the words "but not repaired," limits the application of that clause to skins that have not been repaired.

From the construction and phraseology of paragraph 439 it might perhaps naturally be expected that the tariff law would contain some provision explicitly referring to furs dressed on the skin not advanced further than dressing and dyeing that had been repaired, but it is conceded that no specific provision therefor is made, and it is also agreed that there is no *eo nomine* provision for manufactures of furs other than what is found in paragraph 439.

We advance to the inquiry as to whether the importation, as represented by the official sample, is dutiable under the second clause of that paragraph.

This relates to "manufactures of furs further advanced than dressing and dyeing, when prepared for use as material." There is no evidence and no finding that these furs have been dyed; they are in their natural shape; nothing has been done to prepare them for use as material other than dressing and repairing the same unless, as is claimed by the United States, they have been stretched. The only evidence as to the stretching is the appearance of the official sample, and whatever that may import may well relate to the dressing process to which the skin has been subjected.

When analyzed, we think the second clause of paragraph 439, so far as applicable to the merchandise in this case, means that, to be dutiable thereunder, the furs must be prepared for use as material

and must have been so far advanced that they have been subjected to such manufacturing processes as to have passed the stage at which dressing and dyeing are ordinarily applied. That Congress assumed dressed and dyeing, as applied to raw fur skins, to be manufacturing processes in themselves, is evidenced by the words "manufactures of furs *further advanced* than dressing and dyeing," in which expression the words *further advanced* are evidently used in the sense of *further advanced in manufacture*.

Now, the official sample here has not been dressed *and dyed*, but has been dressed *and repaired*, and it is claimed by the appellant that repairing is a manufacturing process, so that the second clause is applicable.

It is not claimed that the word "repaired," as used in the paragraph, has other than the ordinary meaning. The definition of the word "repair," as given in the Standard Dictionary, is "to mend, add to, or to make over; to restore to a sound or good state," and without doubt it is so commonly understood.

The official exhibit shows certain sewing has been done thereon in various places and it is claimed in argument by the appellee that it is done to close slits in the skin and to strengthen weak places therein. We can only conjecture the purpose of this sewing, but it is assumed by both sides that it constitutes the repairs that have been made to the skin.

In Ullmann's case (T. D. 30764), decided July 11, 1910, the Board of General Appraisers had before it skins similarly sewed, although it was there found the sewing was of a temporary nature. So far as we are able to judge from the official exhibit, the sewing here is of a permanent character. The board in the Ullmann case, however, held that whether temporary or permanent, such repairs were not of themselves a manufacturing process within the meaning of the clause here under consideration.

No appeal appears to have been taken from their decision, and the board held that the Ullmann case was "*res judicata* of the question at issue" in the case at bar.

In view of what has been said, we think, when the record and exhibit here are considered and regard had to the fact that we have no warrant to assume that the word "repaired" can be given other than its ordinary meaning, that it must be held that the repairs made to the skins under consideration and the dressing thereof have not resulted in a "manufacture of furs" and that these skins have not been prepared for use as material within the scope of the second clause of paragraph 439 and are not classifiable thereunder.

The importer having by his protest claimed in the alternative that the merchandise was dutiable as a nonenumerated, partly or wholly manufactured article, under paragraph 480, which imposes the same

rate as the first clause of paragraph 439, and no suggestion being made that if this paragraph be found applicable it may not be invoked, we proceed to examine that claim.

The appellee in his brief expressly states that the skins are furs manufactured; the United States, by its contention that they are manufactures of furs within the meaning of the second clause impliedly, of course, admits that they have been partly if not wholly manufactured; and both agree that no paragraph of the tariff act *eo nomine* subjects them to duty.

The manifest purpose of the tariff act is to levy a duty upon all articles imported from a foreign country, except such as may be specifically exempted therefrom by the act itself. To secure this result, the act, in addition to those paragraphs which tax articles *eo nomine*, contains what are commonly called "catch-all" paragraphs, of which paragraph 480 is one.

Paragraph 573 providing for free entry of "furs, undressed," and paragraph 574 providing for free entry of "fur skin of all kinds not dressed in any manner and not specially provided for" appear to be the only paragraphs admitting fur-bearing skins to free entry.

These provisions we think clearly indicate that Congress intended to subject furs partly or wholly manufactured that were not dutiable under the provisions of paragraph 439 to the payment of some duty. It being claimed by both sides in this case that the merchandise is partly or wholly manufactured it follows that it is dutiable at 20 per cent ad valorem under the provisions of paragraph 480.

It is true that it appears somewhat inconsistent to hold that dressed fur skins, excluded from the first clause of paragraph 439 because they have been subjected to additional treatment than those dutiable thereunder, namely, have been repaired, should nevertheless be held under another paragraph to pay the same rate of duty as that specified in the clause from which they are excluded. This inconsistency, however, arises from the fact that the tariff act neglects to make provision for dressed and dyed furs that by repairing or otherwise have been advanced beyond the condition prescribed in the first clause of the paragraph and yet have not reached the stage of manufacture which is necessary to include them within the second clause thereof. For this legislative lapse, if such it be, we can afford no remedy.

We hold, therefore, that the merchandise involved in this case is dutiable at the rate of 20 per cent ad valorem under paragraph 480 of the tariff act of August 5, 1909, and not under paragraph 439 thereof, as held by the board, but the rate under either paragraph being the same it results that the judgment of the Board of General Appraisers in respect to the rate of duty is *affirmed*.

MORIMURA BROS. v. UNITED STATES (No. 94).¹

COTTON SCREENS IN A FRAMEWORK OF WOOD.

On a review of the statutes and the decisions founded on the statutes, it is held that screens with panels of cotton, ornamented with embroidered designs or with figures appliquéed thereon, were not dutiable as furniture or as a manufacture of cotton under tariff act of 1897, but were dutiable under paragraph 339 of that act at 60 per cent as "other articles" embroidered or appliquéed.

United States Court of Customs Appeals, October 12, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York,
G. A. 6605 (T. D. 28204).

[Affirmed.]

Joseph G. Kammerlohr (*John Giblon Duffy* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The goods involved in this case are screens, the panels of which are of cotton in a framework of wood. The panels of some of the screens are ornamented with designs embroidered on the cloth and the panels of others with embroidered figures or designs which are appliquéed to the cloth. The collector of customs at the port of New York classified the screens as silk-embroidered articles and assessed them for duty at 60 per cent ad valorem under the provisions of paragraph 390 of the tariff act of 1897, the parts of which material to the case are as follows:

390. Laces, * * * embroideries and articles embroidered by hand or machinery, or tamboured or appliquéed, * * * all of the above-named articles made of silk, or of which silk is the component material of chief value, not specially provided for in this act, * * * sixty per centum ad valorem: * * *.

The importers objected to the classification and the duty imposed, and among other grounds of protest the claim was set up that the goods were dutiable either at 35 per cent ad valorem as house furniture or manufactures of wood under paragraph 208, or at 45 per cent ad valorem as manufactures of cotton under paragraph 322, which paragraphs are as follows:

208. House or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem.

322. All manufactures of cotton not specially provided for in this act, forty-five per centum ad valorem

As it appeared on the hearing that none of the screens was made of silk and that all of them were composed in chief value of cotton,

¹ Reported in T. D. 31941 (21 Treas. Dec., 263).

the Government admitted that they were not embroidered articles made of silk or of which silk was the component material of chief value and that therefore they were not dutiable under paragraph 390, which was the paragraph under which they were assessed for duty by the collector. The Government claimed, however, that the rate of duty imposed was correct and should be sustained under the provisions of paragraph 339, which reads as follows:

339. Laces, lace window curtains, tidies, pillow shams, bed sets, * * * embroideries and all trimmings, * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; * * * all of the foregoing, composed wholly or in chief value of flax; cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, * * * sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabrics, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

The board decided that the screens were dutiable under paragraph 339, as claimed by the Government, and the importers appealed.

Counsel for the importers argue that the decision of the board should be reversed: First, because the screens imported are house furniture of wood and therefore dutiable under paragraph 208; second, because the screens are embroidered or appliquéed articles not of the kind, class, or nature of those mentioned in paragraph 339, and are therefore not dutiable thereunder; third, because the screens, if not dutiable as house furniture of wood, are dutiable as manufactures of cotton not specially provided for under paragraph 322.

Giving to words their strict meaning rather than the signification resulting from a careless use of them, screens such as those imported are not house furniture at all, but house furnishings—that is to say, articles designed more for the ornamentation of the house than for the personal use or convenience and comfort of its occupants. The term “furniture” as ordinarily used may mean that with which anything is furnished, supplied, or equipped. House furniture has a restricted signification, however, which does not cover everything with which a house may be furnished, supplied, or equipped. House furniture, in these modern times, has come to denote those articles of household utility which were formerly made of wood and which are designed for the personal use, convenience, and comfort of the dweller. House furnishings, on the other hand, are the subsidiary adjuncts and appendages of the house, designed for its ornamentation or which are of comparatively minor importance so far as personal use, convenience, and comfort are concerned. Chairs, stools, tables, writing desks, wardrobes, bureaus, bedsteads, and chiffoniers are truly house furniture, and tidies, pillow shams, bed sets, window

curtains, and ornamental screens are just as truly house furnishings. If we are correct in our conclusion that ornamental screens such as those imported are house furnishings, it can not be said that no articles of the same general class or nature were provided for in paragraph 339. Neither can it be said that no article approximating them in character is therein mentioned. Screens serve practically the same object as window curtains. They shield the occupants of the dwelling or room from light, heat, and observation just as do curtains, and after all in purpose they are really nothing other than framed movable curtains. Therefore, even if the proviso to paragraph 339 be limited as contended to articles which are *ejusdem generis* with the articles previously mentioned therein, it would seem that the provisions of the proviso are applicable to ornamental embroidered screens which are of the same general class, nature, and kind as other house furnishings specifically enumerated and in particular of the same class and kind as window curtains. But however that may be, we think that the legislative history of paragraph 339 is such as to leave no reasonable doubt that Congress intended that the proviso thereto should extend to every embroidered article in the tariff act unless excluded from the operation of the proviso by apt language to that effect, and that the embroidered articles not having been so excluded are dutiable as assessed. Paragraph 373 of the tariff act of 1890 was the prototype of paragraph 339 of the tariff act of 1897 and reads in part as follows:

373. Laces, edgings, embroideries, * * * lace window curtains, and other similar tamboured articles, and articles embroidered by hand or machinery, embroidered and hemstitched handkerchiefs, * * * all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them is the component material of chief value, not specially provided for in this act, sixty per centum ad valorem: *Provided*, That articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed.

Under this paragraph of the tariff act of 1890, the board in T. D. 11375 decided that screens composed of a framework of bamboo with a center piece of embroidered silk were, under the testimony, *in chief value of wood*, and therefore dutiable at 35 per cent ad valorem, under paragraph 230 of that act, which provided for house or cabinet furniture of wood, manufactures of wood, or of which wood is the component material of chief value. This at least impliedly held that screens of that character were not covered by the proviso to paragraph 373, declaring that articles of *wearing apparel* and *textile fabrics* when embroidered by hand or machinery, whether specially or otherwise provided for in the act, should not pay a less

rate of duty than that fixed by the respective paragraphs and schedules of the act upon embroideries of the materials of which they were respectively composed. In the case of the China & Japan Trading Co., Ltd. (T. D. 13663), the board found that screens composed of wood and cotton embroidered, which were assessed at 60 per cent ad valorem under paragraph 373 of the tariff act of 1890, and which were claimed, among other things, to be house furniture of wood, or manufactures of wood, were *composed in chief value of cotton cloth embroidered* and decided that they were dutiable as assessed. In that decision the board took occasion to refer to its previous decision as to Japanese screens in T. D. 12966, and to say that the board's remark that screens with silk and cotton panels, silk chief value, were erroneously classified as embroideries was *dictum*. These decisions informed Congress that paragraph 373 of the tariff act of 1890 was not sufficiently comprehensive to embrace embroidered articles which were not in chief value of cotton, and with that information before it, it passed Schedule J of the tariff act of 1894 and paragraph 276 thereof, which in part reads as follows:

276. Laces, * * * embroideries, * * * lace window curtains, tamboured articles, and articles embroidered by hand or machinery, embroidered handkerchiefs, * * * all of the above-named articles, composed of flax, jute, cotton, or other vegetable fiber, or of which these substances or either of them, or a mixture of any of them is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem.

It will be observed that the language in this paragraph was very broad and in terms covered embroideries, articles embroidered by hand or machinery, and embroidered handkerchiefs composed of cotton or of which cotton was the component material of chief value, and not specially provided for. Nevertheless, if it was the legislative intention to remedy any of the deficiencies of paragraph 373, Congress was soon brought to a realization of the fact that that purpose had not only not been attained, but that embroidered articles of wearing apparel and embroidered fabrics, if specially provided for, had been released from the embroidery duty by the omission of the proviso to paragraph 373 of the tariff act of 1890. In the case of the United States v. Einstein (78 Fed. Rep., 797-799) the court, speaking of the proviso to paragraph 373 of the tariff act of 1890, stated that it was for the purpose of making it certain that *no embroidered article of wearing apparel or embroidered textile fabric*, however named or provided for in the act, should escape an embroidery duty, and that the omission of the proviso from the act of 1894 released from the embroidery duty any embroidered article of wearing apparel or embroidered fabric if it was specially or otherwise provided for in the act.

With this as the status of the legislation in 1890 and 1894, and the decisions thereunder, Congress was confronted again in 1897 with the proposition that embroidered articles not specifically subjected

to the embroidery duty, and which were otherwise specially provided for, would escape the duty imposed on articles embroidered with like materials. Accordingly, in the act of 1897 the proviso to the act of 1890 was restored to the tariff act in an amended form, which included not only *wearing apparel* and *textile fabrics*, but other embroidered articles. It is important to note that the language used in the proviso to paragraph 339 of the act of 1897 was stronger than that employed in paragraph 373 of the act of 1890, and as if to emphasize its intention to subject all embroidered articles to the conditions of the proviso, unless specially excluded, Congress put the proviso in the negative form—that is to say, it provided that “no wearing apparel or other article or textile fabrics when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.” As “wearing apparel” and “textile fabrics” are general terms and cover completely their respective classes, the words “other article” can not be construed to refer to things *ejusdem generis*. The expression “wearing apparel” comprises all kinds of wearing apparel, “textile fabrics” all kinds of textile fabrics, and to give to the words “or other article” no broader interpretation than that of “other articles of wearing apparel” or “other articles which are textile fabrics” would convert the added enumeration into mere surplusage. The proviso to paragraph 339 of the tariff act of 1897 would thus become practically a replica of the proviso to paragraph 373 of the tariff act of 1890, and we would be put in the position of assuming that the additional language contained in the former gave it no wider signification than that accorded to the latter by the tribunals whose duty it was to interpret it. Such an assumption we can not make without doing violence to what we consider the manifest intent of Congress and a settled rule of statutory interpretation, which has been aptly stated as follows:

The rule of *ejusdem generis* is only a rule of construction to aid in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute as that purpose may be gathered from the whole instrument. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case the general words must be given a meaning outside of the class indicated by the particular words or it must be said that the general words are meaningless, thus sacrificing the general words to preserve the particular words. In that case the rule of *ejusdem generis* would defeat its own purpose. *National Bank of Commerce v. Ripley* (161 Missouri, 126, 132); *United States v. Mescall* (215 U. S., 26, 31).

Whether the embroidered screens are or are not house furniture of wood, they are articles embroidered by hand or machinery, and not being specially excluded from the operation of the proviso to para-

graph 339, they are dutiable as therein prescribed. *Kaufmann v. United States* (128 Fed. Rep., 468); *Lichtenstein v. United States* (154 Fed. Rep., 736).

Whether the screens which are appliquéd are embroidered articles within the intent of the proviso it is unnecessary to decide. The designs on those screens, instead of being embroidered on the cloth of the screen, appear to have been embroidered separately and then stitched to the screen. They are therefore clearly articles which are appliquéd. It is found by the board and practically admitted by counsel for the importers that all the screens are in chief value of cotton. Wood is not the predominant material in the construction of the screens and serves no other purpose than that of giving them a definite shape and form. The important essential part of the screen is the embroidered or appliquéd cotton cloth, which is both the predominant material and the component material of chief value. As we do not consider the screens as house furniture at all, and certainly not house furniture of wood, we think that the appliquéd screens fall directly within the following language of paragraph 339:

* * * Tamboured or *appliqued articles*, fabrics, or wearing apparel, * * * all of the foregoing, composed wholly or in chief value of flax, *cotton*, or other vegetable fiber, and not elsewhere specially provided for in this act, * * * sixty per centum ad valorem—

and are therefore dutiable as assessed.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, having participated in the decision of the board, did not sit.

WOODRUFF & Co. v. UNITED STATES (No. 195).¹

SHIRTS WITH EMBROIDERED INITIALS.

Initials embroidered on cotton shirts makes of the shirts embroidered articles, and the importation was dutiable as such under paragraph 339, tariff act of 1897.

United States Court of Customs Appeals, October 12, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 22650 (T. D. 30314).

[Affirmed.]

Brown & Gerry for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, and BARBER, Judges.

SMITH, Judge, delivered the opinion of the court:

The firm of A. J. Woodruff & Co. imported at the port of New York certain cotton shirts for men, embroidered below the waist line

¹ Reported in T. D. 31942 (21 Treas. Dec., 361).

with initials for the identification of the garments. This merchandise was classified by the collector of customs as embroidered cotton wearing apparel and he accordingly assessed it for duty at 60 per cent ad valorem under paragraph 339 of the tariff act of July 24, 1897, the part of which material to this case reads as follows:

339. * * * Embroideries and all trimmings, * * *; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; * * * all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, * * * sixty per centum ad valorem: *Provided*, That no wearing apparel or other article or textile fabrics, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

The importing firm protested that the shirts were not embroidered within the meaning of paragraph 339 or the proviso thereof and that they were dutiable either at 45 per cent ad valorem as manufactures of cotton or other vegetable fiber under paragraphs 322 and 347 or at 50 per cent ad valorem as wearing apparel composed of cotton or other vegetable fiber under the provisions of paragraph 314, which in part reads as follows:

314. Clothing, ready-made, and articles of wearing apparel of every description, including neck-ties or neckwear composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem: * * *.

The Board of General Appraisers overruled the protest and the importers appealed.

The goods were returned by the appraiser as "embroidered cotton wearing apparel."

It is established by the evidence in the case that the goods involved in the appeal are men's shirts made of cotton and that below the waist line near the lower left-hand corner of the bosom there are initial letters in red thread worked in by the needle. These initials are raised above the surface of the cloth and an examination of the illustrative samples in evidence clearly shows that they are made with an embroidery stitch and that they are in truth and in fact embroidered. Indeed they are so designated by the importer himself, who was the only witness who appeared on the hearing. Notwithstanding the fact, however, that the shirts are truly embroidered with these initials counsel for the appellants contend that such an embroidery on the shirts does not constitute "wearing apparel embroidered in any manner" within the meaning of paragraph 339. In this behalf it is argued that the embroidery must be ornamental and not utilitarian in character and that as the initials are designed solely for the utilitarian purpose of identification and are so placed

on the shirt that they can not be seen when the garment is worn they are in no sense ornamental. We can not agree with this contention of the importers. The initials are not plain or ordinary in character. They are embroidered initials made with the true embroidery stitch and are something more than the plain or ordinary initial produced by the stamp or stencil. They are more attractive and more pleasing to the eye than letters less elaborately produced and must therefore be regarded as ornamental letters as contradistinguished from less pretentious productions. Even if the embroidery must be ornamental in order to constitute an embroidery, the initials on the shirt clearly and unmistakably fall within that class.

Counsel for the importers, however, insist, in effect, that however ornamental the initials in themselves may be, they are no ornament to the shirt and serve only a useful purpose. That we can not concede. They are an addition to the shirt which contributes to its beauty and elegance, and to that extent they are ornamental within the definition of that word. To the shirt they give an appearance which the stenciled or stamped initial could not give—an appearance, by the way, calculated and designed to catch and please the eye of the purchaser. It can scarcely be said, therefore, that the sole object of the initials is utilitarian. Indeed it appears from the evidence that such initials are not put on the ordinary shirt. The Circuit Court of Appeals for the Second Circuit, in the case of *United States v. Harden* (68 Fed. Rep., 182), held that handkerchiefs composed of cotton, hemstitched and embroidered with an initial, were not classified in the speech of commerce as embroidered, and that the embroidery of a single letter thereon was so limited in extent that the handkerchiefs should not be regarded as embroidered. The principle laid down in this case was subsequently affirmed in the case of *United States v. Amster* (71 Fed. Rep., 958). Subsequent to these decisions, however, Congress, by the tariff act of July 24, 1897, broadened the language of the tariff act of 1890 so as to cover not only wearing apparel “embroidered by hand or machinery,” but also wearing apparel “embroidered in any manner by hand or machinery, whether with a letter or monogram or otherwise.” In the light of this change it would seem that the only question to be determined in this case is, Are the initials embroidered? As that fact is substantially admitted, or at all events clearly shown by the evidence, it would seem that there is nothing left to the case. The conclusion here reached is not in conflict with the decision of the Circuit Court of Appeals in the case of *Morris European & American Express Co. v. United States* (T. D. 28170), in which case the Circuit Court of Appeals adopted the views of the dissenting opinion and reversed the board. In that case General Appraiser De Vries, who dissented, found that the initials were

stitched in by a process which was not of the character or nature of embroidery. The same general appraiser who dissented in that case finds that the initials in this case are embroidered.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, having participated in the decision below, did not sit.

UNITED STATES v. BROWN (No. 130). UNITED STATES v. KWONG TAI CHONG (No. 131). UNITED STATES v. QUONG YEE WO (No. 132).¹

SHORTAGE OF BOTTLES PACKED IN CASES.

Proof of discovery of shortage by an unofficial examination after packages have been discharged from vessel and after surrender of manual possession of the packages by customs officers is not sufficient by itself to support a claim that the goods have not been imported.

United States Court of Customs Appeals, October 12, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21075 (T. D. 29700).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Brown & Gerry for the appellees.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

A consignment of Chinese wines put up in bottles and packed in cases was imported in December, 1907, and January, 1908, at the port of New York. After arrival a percentage of the cases was designated and retained for examination by the collector. The rest of the importation was turned over to the importers on their general bond, which provided that the packages delivered to them would be returned unopened to the collector on his order at any time within 10 days after report to him of the appraisal of the retained packages and that the bond should be forfeited if in the meantime any package thus subjected to the order of the collector should be opened without his consent or that of the surveyor in writing. The owners, after receipt of the merchandise, discovered that 7 of the original packages were short of the full number of 18 bottles which each case was supposed to contain. In the cases claimed to be short the number of bottles found therein and the number of bottles missing therefrom were as follows: Case No. 100 contained 2 bottles, missing 16 bottles; case No. 81 contained 6 bottles, missing 12 bottles; case No. 33 contained 2 bottles, missing 16 bottles; case No. 27 contained 8 bottles, missing 10 bottles; case No. 124 contained 2 bottles,

¹ Reported in T. D. 31943 (21 Treas. Dec., 364).

missing 16 bottles; case No. 114 contained 13 bottles, missing 5 bottles; case No. 149 contained 11 bottles, missing 7 bottles; total number missing, 82 bottles.

The shortages in cases Nos. 81, 100, 114, 124, and 149 were discovered on the day of delivery, and the shortages in cases Nos. 27 and 33 one week later. No customs officer was present when the discovery was made, and so far as the record discloses the collector received no notice of the fact that any of the merchandise was missing until the filing of the formal protests. On April 14, April 15, and June 6, 1908, the several entries were liquidated and duty assessed on the basis of 18 bottles to the case. The importers in due time protested that the missing bottles had not been imported and therefore claimed that they were not dutiable. The Board of General Appraisers sustained the protest and the Government appealed.

In support of its appeal the Government contends, first, that the nonimportation of the missing bottles not having been established by satisfactory evidence they must be considered as imported and therefore dutiable as assessed; second, that the missing merchandise is dutiable (a) because the deficiency not having been discovered as a result of an examination by the appraisers no allowance can be made therefor under the provisions of section 2921 of the Revised Statutes, (b) because the cases found without their full complement of bottles were opened by the importers in the absence of customs officers in violation of their bond and the conditions upon which delivery was made to them; third, that whatever might have been the number of bottles in the cases at the time of importation the goods should be assessed for duty on the basis of one dozen bottles to the case under the concluding proviso of paragraph 296 of the tariff act of 1897.

As to the first point, we are of opinion that upon the importers rested the burden of proving that the missing merchandise was not imported and never came within the tariff jurisdiction of the United States. The invoice and the entry of the goods raised the presumption that the goods in the quantities therein specified were actually imported, and to overcome that presumption it devolved on the importer to prove, at least *prima facie*, that the missing merchandise had never as a matter of fact arrived at the proper port of entry. (*Merwin v. Magone*, 70 Fed. Rep., 776, 777, 778.) The only evidence produced by the importers in that behalf was to the effect that after the arrival of the packages at the places of business of the owners an unofficial examination of some of the cases on the day of delivery and of others a week later disclosed that certain packages were short of their full complement of bottles. As this discovery was made after the packages were discharged from the vessel and after manual pos-

session of such packages had been surrendered by the customs officers it can not be considered as evidence showing that the missing bottles were removed from the cases prior to the arrival of the latter within the jurisdiction of the port. The importers failed to make any proof that the cases released by the customhouse were preserved intact while in the possession of the drayman who delivered them or that they were so guarded and cared for that none of the bottles were or could have been removed therefrom while in transit or under his control. Neither was any evidence introduced to show that all reasonable precautions were taken to prevent the abstraction of bottles from the packages after their arrival at the storeroom of the importers, or that the merchandise was so protected that its surreptitious withdrawal was impracticable. For all that appears from the record some of the missing bottles may have been lost while in transit from the customhouse and others while the packages were in the hands of the owners. To hold that invoiced and entered goods may be relieved from duty merely on proof of the fact that they were not found in the packages by the importers after they had acquired and the customs officers had lost possession thereof, unaccompanied by any evidence showing or tending to show that the missing merchandise was not lost in transit from the customhouse or withdrawn after deposit in the importers' storerooms, would, in our opinion, establish a precedent likely to lead to very serious abuses.

The importers did prove that they had presented a claim of loss to the steamship company for 52 of the bottles not received by them and that such claim had been allowed and paid. Such an adjustment, even if it were competent evidence against the Government, which was not a party to it, falls far short of establishing that the merchandise for which the allowance was made was never imported and was lost, stolen, consumed, or destroyed before its arrival within the jurisdiction of its proper port of entry. The liability of shipping companies as carriers of merchandise does not usually terminate on the arrival of the vessel in port, but continues until the cargo is discharged overside, and the settlement proved by the importers might just as well have attached to merchandise lost in port as to merchandise lost beyond its confines for aught that appears to the contrary.

No appeal seems to have been taken by the Government to this court from the decision of the board covering the package numbered 171, included in protest No. 334018, and covering the package numbered 114, included in protest No. 325510. The decision of the board as to these two packages, therefore, can not now be questioned.

The point made in brief of counsel for the Government that no satisfactory evidence was adduced by the importers showing that the

bottles missing from the other cases were not imported seems to us to be well taken and to be covered by proper assignments of error. Holding this view of the case it is unnecessary for us to pass upon the other points raised.

The decision of the Board of General Appraisers is *reversed*.

CONSOLIDATED COLOR & CHEMICAL CO. v. UNITED STATES (No. 240).¹

TETRACHLORIDE OF TIN—LAC SPIRITS.

Tetrachloride of tin, while admittedly a chemical compound, was not dutiable as such under tariff act of 1897, and being, as appears from a preponderance of the testimony in this case, lac spirits, it was, as such, free of duty under that act

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7016 (T. D. 30584).

[Reversed.]

Curie, Smith & Maxwell (W. Wickham Smith and Thomas M. Lane of counsel) for the appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified an importation of tetrachloride of tin as a chemical compound and assessed it for duty at 25 per cent ad valorem under the provisions of paragraph 3 of the tariff act of July 24, 1897, which is as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts not specially provided for in this act, twenty-five per centum ad valorem.

The Consolidated Color & Chemical Co., which imported the merchandise, protested that the importation was one of lac spirits and therefore free of duty under paragraph 593 of the free list, which reads as follows:

Free list.—SEC. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty:

* * * * *

593. Lac spirits.

The Board of General Appraisers overruled the protest and the importers appealed.

The importation is a tetrachloride of tin and is admittedly a chemical compound, but it is claimed to be a special class of chemical compound known as lac spirits, specifically provided for under that name,

¹ Reported in T. D. 31944 (21 Treas. Dec., 367).

and entitled to free entry by virtue of the paragraph of the free list above cited. Whether the importation is lac spirits within the meaning of paragraph 593 is therefore the sole question to be determined. On this point four witnesses testified on the part of the appellant, three of them practical chemists of long experience and all four of them engaged in the business of manufacturing colors and dyes for periods of time running from 11 years to 25 years. The three chemists, Schweitzer, Clarkson, and Hirschberg, testified positively and directly that they were familiar with and had actually used a material known as lac spirits in the dyeing of textiles. Schweitzer became acquainted with it as early as 1880, and although he never sold the article he bought and actually applied it as a dyer in the years 1888 and 1889. Besides all that, Schweitzer stated that he himself had made lac spirits and used the product for dyeing experiments. Clarkson knew that there was such a material as lac spirits in 1887 and declared that the Quaker City Dye Works Co., with which he was connected as chemist, manufactured it to his knowledge for the purpose of dyeing scarlets for four and one-half years prior to 1897. To Hirschberg lac spirits became known about the year 1900 while he was in England.

From the testimony of the chemists just named it further appears that lac spirits were at one time extensively used as a mordant in dyeing with cochineal and lac dye and also as a weighting material in the dyeing of silks; that with the coming in of the coal-tar colors lac and cochineal dyes were driven out to a large degree, but that lac spirits are and must be still employed whenever lac and cochineal scarlets are used in dyeing; that the importation is a tetrachloride of tin and is manufactured by dissolving tin in hydrochloric or muriatic acid in the presence of nitric acid or by treating stannous chloride with nitric acid or latterly by the cheaper process of submitting tin directly to the action of chlorine gas; that lac spirits is tetrachloride of tin and, as known to three of the witnesses, was made generally by one of the two first methods; that lac spirits and the importation are both stannic chlorides, are both liquids, and are both represented by the same chemical formula SnCl_4 ; that lac spirits and the importation are used for the same purpose, namely, as a mordant for lac and cochineal dyes; that the only difference between them is that one is diluted with water and the other is not; that the tetrachloride of tin in controversy is really highly concentrated lac spirits and is imported in that form to save freight, but that it can not be used by the dyer in its concentrated state and must be diluted with water to protect from injury the textiles to be dyed; that stannous chloride of tin is not a tetrachloride of tin and is represented by a different formula, to wit, SnCl_2 .

The chemists and the witness Allen, testifying for the importers, agreed that the stannous chloride can not be used for dyeing with lac

or cochineal because it produces too dull a shade. Allen says, however, that although worthless for lac or cochineal dyes, it may be and is used for making eosine lakes and coal-tar colors. As against this evidence submitted by the appellant the Government offered the testimony of three witnesses, one of them a manufacturer of chemicals, inclusive of tetrachloride of tin, and the other two chemists. These witnesses were all men of long experience in their particular lines, but none of them, so far as shown, had ever been engaged in the business of dyeing or served as a chemist to a textile dyeing establishment. Admittedly none of them had ever used lac spirits for practical or commercial purposes, and admittedly none of them knew anything at all about the article under that name except what he had read of it in books. The witness Bower stated that he had consulted Watts's Dictionary, Ure's Dictionary, and Napier's book on dyeing, and that the formulas there given for lac spirits would not produce tetrachloride of tin, but stannous chloride. That the formula given in Ure's Dictionary for lac spirits was three parts of foaming hydrochloric acid and one part of tin, which formula he followed and secured a stannous and not a stannic salt. On cross-examination the attention of this witness was called to Ernest Spont's Workshop Receipts, and to the fact that the formula therein set out for lac spirits was 3 gallons of muriatic acid and 2 gallons of water, fed with 6 pounds of tin and 1 gallon of nitric acid. The witness said he did not agree with this formula because the books which he had consulted did not provide for nitric acid as a chemical component. He disagreed also with the following formula for lac scarlet set out in the work entitled "Practical Treatise on Dyeing and Calico Printing," by Robert McFarland, of the Scientific American, 1860, to wit: Mix 27 pounds of muriatic acid of the specific gravity of 1.17 with a pound and a half of *nitric acid* of 1.19; put this mixture in a soft glazed bottle and add to it in small bits at a time tin until 4 pounds are dissolved. He said that he did not consider lac spirits and lac scarlet spirits as identical. In this connection it might be well to note that lac spirits is the mordant for lac and cochineal, which are scarlet dyes.

Ralph W. Bailey stated that he had consulted Neile, Watts's Chemical Dictionary, Cooley's Book of Practical Receipts, and the Encyclopedia Britannica, and that the formula of those books for the making of lac spirits called for the dissolving of tin in hydrochloric acid, which would produce a stannous and not a stannic chloride. He stated further that he had been unable to find any description of lac spirits the manufacture of which called for the use of nitric acid.

Russell W. Moore, chemist in charge of the appraiser's laboratory at New York, stated that lac spirits is an obsolete term, and that in his investigation of it he found it described in old and obsolete works.

That some authorities described it as produced by dissolving tin in hydrochloric acid and others by treating stannous chloride with *nitric acid*, producing what was then called in the old way nitrate muriate of tin; *that the only difference between nitrate muriate of tin and the importation is that one is an impure dilute article and the other a pure concentrated article; that tetrachloride of tin exists in both and is represented by the same chemical formula; that the impurities in the dilute article are stannous salts and some nitric and hydrochloric acid in excess; that lac spirits belonged to both stannous and stannic salts in an indeterminate way.*

On this state of the evidence the board found, first, that the merchandise imported was tetrachloride of tin, a stannic salt produced by dissolving tin in hydrochloric acid in the presence of nitric acid and used in the textile industries for mordanting, dyeing, and weighting; second, that lac spirits is a solution of tin in hydrochloric acid and therefore a solution of a stannous chloride or stannous salt in water; third, that tetrachloride of tin is neither commercially nor commonly known as lac spirits. To sustain the second finding of the board requires us to disregard the positive, direct, unimpeached testimony of at least three witnesses on the part of the importer who were eminently qualified to testify as to lac spirits and to accept that of witnesses whose sole information on the subject was derived from books, the status of which as standard authorities was not established. This we are not prepared to do, inasmuch as other books entitled to at least as much weight as those referred to by the witnesses for the Government fully sustained the statement of the importer's witnesses that lac spirits were made by dissolving tin in hydrochloric acid *in the presence of nitric acid*, thereby producing, according to the witness Schweitzer, a tetrachloride of tin, which is a stannic and not a stannous salt. If we reject the evidence of both lines of books as conflicting and lacking in probative force, the testimony of importer's witness stands uncontradicted and fully establishes that the importation and lac spirits are both tetrachloride of tin, manufactured from the same materials and in the same way. In analyzing the testimony it should not be forgotten that tin and hydrochloric acid produce a stannous chloride which is not tetrachloride of tin. If we accept one line of authorities we must accept the other, and to reconcile them no course is open except to conclude that the term "lac spirits" covered both the stannous chloride and the stannic chloride, and from that it would follow that *both* chlorides would be entitled to free entry.

As to the third finding of the board, that tetrachloride of tin is neither commercially nor commonly known as lac spirits, it is sufficient to say that whether tetrachloride of tin is now known as lac spirits is beside the question. Whether the article once commercially known as lac spirits is tetrachloride of tin is the point involved.

If, when provision was made for lac spirits on the free list, there was an article commercially known by that name and that article, chemically speaking, was tetrachloride of tin, the fact that it subsequently lost its commercial name and took its chemical and scientific designation would not remove it from the free list or deprive it of the concession made by Congress to the article and not to its name. Beyond debate there was a material which at some time in the history of tariff legislation was either popularly or commercially known as lac spirits. Provision was made for it in the free list of the tariff act of 1890, and the United States General Appraisers, in T. D. 12953, held that the lac spirits there mentioned was a *dyestuff* and not a varnish. Subsequently, when the tariff act of 1897 was passed, lac spirits was continued on the free list, and that action on the part of Congress must be presumed to have been taken in the light of the appraisers' decision that there was an article known as lac spirits and that lac spirits was used for dyeing and not for varnishing. Whether lac spirits was a stannic chloride or a stannous chloride or both was not put in issue in T. D. 12953 and was, therefore, not tried or litigated in that case. What was said by the board in that behalf can not therefore be held to have been presumptively confirmed by a subsequent legislative enactment which repeated the language of the paragraph which was interpreted by the decision. On a protest that lac spirits was a varnish the board classified it as a dyestuff, and as to that classification, and nothing more, the legislature may be presumed to have approved the decision of the board.

Russell Moore, a witness for the Government, testified that lac spirits resulting from the chemical reaction of hydrochloric acid and nitric acid on tin would be an impure tetrachloride of tin as compared with the importation, which, he said, was a pure concentrated article. Admittedly lac spirits are diluted with water and the importation is not. That fact, however, affects only the strength of the article and does not alter essentially its nature and character as a mordant, which Congress intended to favor by putting it on the free list.

The board finds in its first finding that the importation is produced by dissolving tin in hydrochloric acid in the presence of nitric acid. It is established by the importers' evidence that lac spirits are made in exactly the same way. That being the case, any impurities found in the one must of necessity be found in the other, exclusive of water, if water can be considered an impurity. If it be true, as suggested by Dr. Moore, a witness for the Government, that the formula for making lac spirits would produce an impure tetrachloride of tin, contaminated by stannous salts, nitrate of tin, and some free nitric acid, it follows that the importation which is found to be made by the same method must contain the very same impurities.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* BORGFELDT & Co. (No. 301). UNITED STATES *v.*
STONE & DOWNER Co. (No. 302).¹

DECALCOMANIA TRANSFERS—LITHOGRAPHIC PRINTS.

Decalcomanias for ceramic decoration, the decorating to be done by transferring the figures and designs from the paper to pottery and fixing them on the pottery by burning or baking, are lithographic prints and were dutiable as such within the meaning of paragraph 400, tariff act of 1897.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7035 (T. D. 30687).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (Martin T. Baldurn on the brief), for the United States.

Comstock & Washburn (Albert H. Washburn of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

SMITH, Judge, delivered the opinion of the court:

In these cases merchandise known as decalcomanias or decalcomanias in sheets was imported at the ports of Boston and New York and assessed for duty by the collectors of customs at those places at 3 cents per pound and 20 per cent ad valorem under the provisions of paragraph 398 of the tariff act of 1897, which reads as follows:

398. *Surface-coated papers not specially provided for in this act, two and one-half cents per pound and fifteen per centum ad valorem; if printed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, three cents per pound and twenty per centum ad valorem; parchment papers, two cents per pound and ten per centum ad valorem; plain basic photographic papers for albumenizing, sensitizing, or baryta coating, three cents per pound and ten per centum ad valorem; albumenized or sensitized paper or paper otherwise surface coated for photographic purposes, thirty per centum ad valorem.*

Borgfeldt & Co., the importers at New York, protested that the decalcomanias imported by them were lithographic prints and as such were dutiable at 20 cents per pound under paragraph 400, the pertinent parts of which are as follows:

400. Lithographic prints from stone, zinc, aluminum or other material, bound or unbound * * * on paper or other material not exceeding eight one-thousandths of one inch in thickness, twenty cents per pound; on paper or other material exceeding eight one-thousandths of one inch and not exceeding twenty one-thousandths of one inch in thickness, and exceeding three square inches, but not exceeding four hundred square inches cutting size in dimensions, eight cents per pound; exceeding four hundred square inches cutting size in dimensions, thirty-five per centum ad valorem: * * * [Then follow specific provisions for various special kinds of lithographs.]

The Stone & Downer Co., the importers at Boston, claimed that the decalcomanias which they imported were dutiable either as litho-

¹ Reported in T. D. 31945 (21 Treas. Dec., 372).

graphic prints under said paragraph 400, or at 2½ cents per pound and 15 per cent ad valorem as surface-coated paper not specially provided for under the first clause of paragraph 398, or at 25 per cent ad valorem either as "all other paper not specially provided for," or as "printed matter * * * not specially provided for" under paragraphs 402 and 403, which said paragraphs are as follows:

402. Paper hangings and paper for screens or fireboards, and *all other paper not specially provided for* in this act, twenty-five per centum ad valorem; all Jacquard designs of one line paper, or parts of such designs, finished or unfinished, thirty-five per centum ad valorem; all Jacquard designs cut on Jacquard cards, or parts of such designs, finished or unfinished, thirty-five per centum ad valorem.

403. Books of all kinds, including blank books and pamphlets, and engravings bound or unbound, photographs, etchings, maps, charts, music in books or sheets, and *printed matter*, all the foregoing *not specially provided for* in this act, twenty-five per centum ad valorem.

The two protests were tried separately by the board, but the testimony taken in one case was made a part of the record in the other in so far as it might be material or pertinent to the issue, and to this method of procedure ordered by the board neither party now makes objection.

The claim of both protestants that the decalcomanias were lithographic prints was sustained by the Board of General Appraisers and the Government appealed.

It appears from the record and samples in evidence that the merchandise consists of sheets of paper 20 by 30 inches in size, covered with colored designs or figures repeated over and over again. The goods are imported for ceramic decoration, which is accomplished by transferring the figures and designs from the paper to pottery and fixing them there by burning or baking. The designs or figures referred to are the creations of an artist and are originally sketched by him in water colors. The sketch is then sent to a lithographer, who reproduces on transparent paper or celluloid the outlines of each color, and thus constitutes the pattern from which the outlines of the several colors are separately transferred by him to as many lithographic stones as there are colors. That is to say, each color is separately outlined on the stone and there are as many outlines placed on as many stones as there are colors in the design or figure. The outlines on the several stones are then etched out with acid by the lithographer, and thus is defined and established a printing surface for the color assigned to each particular stone. So etched, the several stones are ready for the press and the reception of their corresponding colors. The colors are either metals or metallic oxides which, with a flux and in the form of a powder, are mixed with printing oil and then spread on metal rollers covered with leather. These rollers are carried over the stone and ink its printing surface with the proper pigment. From the inked stones the sev-

eral colors in their proper order are impressed in succession on appropriate paper until the design or figure is complete.

The paper upon which the decalcomania is printed is of a particular kind and quality, and is manufactured abroad by a process the details of which are fully known only to those who make a specialty of its manufacture. There are two grades of the paper, one known as simplex and the other as duplex paper. As far as we are able to gather, the simplex is a single layer of paper, while the duplex is composed of a thin, porous layer of tissue paper, bound by suction, it is said, to a layer of strong white paper, which serves as a backing. To serve the purpose of making decalcomanias, the paper, whether it be simplex or duplex, is surfaced with a solution of starch, and this in its turn is coated with dextrin or gum, the duplex paper being surfaced on the tissue-paper side. This coating of dextrin or gum receives from the stones the colored design or figure, and accomplishes, it seems, the double object of preventing the colors from running into the starch and paper and of fastening the design to the pottery. The layer of starch, on its part, prevents the gum from sticking to the paper, and when moistened with water permits the withdrawal of the paper, thus leaving the design or figure attached by the gum to the article to be decorated. The design or figure is then permanently fixed to the pottery by burning or baking. This briefly describes the process of manufacturing the decalcomanias and the commercial use to which they are put after completion.

The Government contends, first, that the goods under discussion are not lithographic prints; second, that the merchandise is surface-coated paper, wholly or partly covered with metal or its solutions; third, that if it be not surface-coated paper covered with metal or its solutions, it is surface-coated paper printed, or printed matter; and fourth, that if it be not surface-coated paper, it is paper not specially provided for.

We think that the evidence in the record clearly shows that the goods in question are lithographic prints within the meaning of paragraph 400 of the tariff act of 1897. The witnesses both for the Government and the importers do not differ materially as to the methods of manufacture and in effect agree that in all essential particulars the processes employed in the making of the ordinary lithographic print are substantially followed in the manufacture of the decalcomanias under consideration. The decalcomanias in question are printed in a lithographic establishment on a lithographic press from a lithographic stone, on which the design or figure has been first traced in lithographic ink and then etched out and prepared for printing by a lithographer. There are, it is true, some differences between the surface-coated paper upon which from 90 to 95 per cent of the ordinary lithographs are printed and the specially surface-

coated paper upon which decalcomanias are impressed. These are differences, however, which do not affect the lithographic character of decalcomanias, but are rather differences which facilitate the use of lithographic prints for a special definite purpose. That is to say, the fact that a lithographic print is so made that it may be transferred to some object for the purposes of ornamentation makes it none the less a lithographic print because of that particular use of it. In this connection it might be well to observe that there is nothing in the make-up of the ordinary lithograph which necessarily or absolutely precludes the transfer of its colored design, figure, or picture to some other object. In fact the evidence is uncontradicted that long prior to the creation of the decalcomania the colors of lithographs were so transferred by pasting the color side to glass and then removing the paper after wetting it. True, such a transfer was done for amusement and was too laborious a process for commercial purposes. Nevertheless, the fact that the common lithograph could be and was so used is of value to show that feasibility of transfer is common to lithographs and decalcomanias. The fact that the decalcomania can be transferred more readily than the ordinary lithograph is important only to the extent that it shows that the decalcomania is an evolution of the lithograph. When the decalcomania was invented the custom of transferring lithographs became obsolete, and for 20 years the former served no other purpose than that of furnishing the amusement which transfers of the latter had originally afforded. That in the course of time a commercial use was found for the decalcomania makes it none the less a creation of lithography and none the less a lithographic print.

The Government also argues that the decalcomanias imported differ from lithographic prints in that some of the colors are not printed from the stone but are dusted on after the paper has left the press. We think the dusting on of the colors is like the special coating of the paper, a mere development of lithographic processes. In practice it was found that the first impression of some of the colors was too faint and that a repetition of the impress was necessary in order to accentuate them and make them more vivid. Moreover, experience proved that from the friction of repeated printing the printing surface of the stone was worn away to such a degree by certain metallic colors that sharpness of impression could not be obtained. To save the labor and cost of repeating the printing and to diminish the wear on the stone, manufacturers finally resorted to the device of dusting on the colors after the impress was taken and while it was still wet. At first dusting was done by hand, and later machinery for the purpose was introduced and used, although hand dusting is still followed, to some extent, especially where the more colors are used. Dusting, whether done by hand or machinery,

is not peculiar, however, to decalcomanias. It is a method which may be and is actually employed in the making of ordinary lithographs and may be fairly considered in no other light than a natural and economic development of the art of lithography resulting from experience and the natural commercial tendency to reduce the cost of production.

As to the point made that the design or figure for ceramic decalcomanias is put upon the stone reversed as compared with the design or figure etched for the ordinary lithograph, it is sufficient to say that decalcomanias, even for pottery, are not always so made. Whether the picture is reversed or not depends entirely upon the design. If the design is such that the printing of it from a positive or negative stone makes no difference in the effect produced, the etching need not be reversed. If the picture when transferred to the pottery would present the appearance of having been put on "wrong end to" the etching is the reverse of that which would be employed for a chrome lithograph. For tariff purposes there is no real distinction, in our opinion, between negative and positive decalcomanias. The reversing of the etching is purely incidental to the design and the effect to be produced, and whether the decalcomania is printed from a positive etching—that is to say, from an etching the reverse of that used for the common lithograph, or from a negative etching, the same as that employed for such a lithograph—it is still a lithographic print. In one case the decalcomania may be called a negative lithographic print and in the other a positive lithographic print, but for all that both are lithographic prints. See *United States v. Sussfield* (1 Ct. Cust. Appls., 51); *Edison v. Lubin* (122 Fed. Rep., 240-242); *Edison Mutoscope & Biograph Co. v. Edison Mfg. Co.* (137 Fed. Rep., 262-266).

If we had any doubt as to whether the decalcomanias under discussion are properly dutiable as lithographic prints, that doubt would be dispelled by what seems to have been a very long-continued departmental practice. The tariff provision for lithographic prints appeared for the first time in the tariff act of 1890. From the date of the passage of that act until the year 1907, a period of 17 years, decalcomanias were assessed for duty as lithographic prints. Their classification as such prints seems to have been questioned for the first time about the year 1903 by the firm of Wakem & McLaughlin, of Chicago. This firm, representing Meyercord & Co., imported certain decalcomanias, which were classified by the collector as lithographic prints and accordingly assessed for duty at 20 cents per pound under paragraph 400 of the tariff act of 1897. The importers, frankly admitting that they represented domestic manufacturers of decalcomanias and desired a higher rate of duty, protested that the goods were labels printed in whole or in part of metal leaf and there-

fore dutiable at 50 cents a pound. The Board of General Appraisers overruled the protest, but its decision was subsequently reversed by the Circuit Court for the Northern District of Illinois, Kohlsaas, judge, no opposition being presented by the Government. The decision of the Circuit Court, however, was not followed by the Treasury Department, which, after taking the opinion of the Attorney General, announced that it was not incumbent upon the department to accept the ruling of the court and instructed customs officers to continue to impose the rate of 20 cents per pound on such merchandise as lithographic prints. (T. D. 25848.)

The practice of classifying decalcomanias as lithographic prints was not again disputed until the year 1907. In that year Hempstead & Sons, representing, it seems, the same Meyercord Co., imported decalcomanias at Philadelphia, which were returned by the local appraiser as "surface-coated paper, printed," and assessed for duty at the rate of 3 cents per pound and 20 per cent ad valorem under the provisions of paragraph 398. The importers claimed that the merchandise was properly dutiable at 20 cents per pound as lithographic prints under the provisions of paragraph 400. On the hearing before the board the importers offered no evidence or testimony to sustain their contention or to support their protest. Special counsel representing the Meyercord Co. appeared, however, at the hearing and contended that neither the rate of duty assessed by the collector nor the rate claimed by the importers was correct. It was argued that mineral colors were used in printing the articles and that they should be assessed at the rate of 45 per cent ad valorem as articles in chief value of metal under the provisions of paragraph 193. The board declared the claim of special counsel to be without merit and, deciding that the decalcomanias were lithographic prints, sustained the protest. From this decision an appeal was taken to the United States Circuit Court, Eastern District of Pennsylvania, and in February, 1908, the court, after taking evidence in what was really an *ex parte* proceeding, found that the decalcomanias were surface-coated paper wholly or partly covered with metal, dutiable under paragraph 398, and a distinct article of commerce different from lithographic prints and printed matter both in manufacture and use.

A reading of the decision in that case in the light of the very complete record in this case leads us to the conclusion that the learned district judge was deprived of the advantage of a bona fide contest and that his findings of fact were based on a one-sided presentation of issues involved. We can not, therefore, give to his decision the weight which it certainly would have been entitled to receive had there been a genuine litigation of the matter. For the same reason that decision can not be considered as neutralizing the legal effect of the long-continued, uninterrupted, and well-established departmental practice which had theretofore existed.

As we are of opinion that the goods covered by the protests are lithographic prints and dutiable as such it is unnecessary to enter upon a consideration of the several contentions of the Government which depended for their force on a contrary finding.

The decision of the Board of General Appraisers is *affirmed*.

STRAUSS & Co. v. UNITED STATES (No. 419).¹

COMBS MADE OF GALLILITH.

Since they most nearly resemble combs made of horn, in accordance with the terms of paragraph 481, tariff act of 1909, combs made of gallilith are dutiable under paragraph 463 of that act.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7047 (T. D. 30725).

[Affirmed.]

Walden & Webster (Henry J. Webster of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Gallilith combs imported at the port of New York were, by reason of their similitude to horn combs and in virtue of the provisions of paragraph 481 of the tariff act of August 5, 1909, assessed for duty by the collector of customs at 50 per cent ad valorem under paragraph 463, the part of which material to the case reads as follows:

463. * * * Combs, composed wholly of horn, or composed of horn and metal, fifty per centum ad valorem.

The importers in due time and form protested that the merchandise was not dutiable as assessed and among other grounds of protest, which it is unnecessary to consider, set up the claim that gallilith combs were dutiable as manufactured articles not provided for at 20 per cent ad valorem under the provisions of paragraph 480, which reads as follows:

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

On the hearing before the board no evidence was introduced or offered in behalf of the importers. Two witnesses testified for the

¹ Reported in T. D. 31946 (21 Treas. Dec., 378).

Government, and from their testimony it appears that the imported goods are fine combs made from a substance called gallilith, which is a product of sour milk. Combs manufactured from gallilith have, of course, the same identical use as combs made from any other material, and in style, shape, and appearance, as shown by the samples in evidence, they are very similar to combs made of horn, in fact "just like them," as stated by one of the witnesses. With this as the evidence, and as neither gallilith combs nor manufactures of gallilith were specially provided for in the tariff act of 1909, under which the importation was made, the board held that the goods were similar in use to the horn combs for which special provision was made in paragraph 463 and, therefore, dutiable under that paragraph by similitude. Counsel for the importers urge that paragraph 481 is not applicable to the goods in question and that they can not be made dutiable by similitude under the last clause of paragraph 463 for the reason that that clause is restricted to combs composed wholly of horn or horn and metal and therefore explicitly excludes all other combs from its provisions. The difficulty with this contention is that counsel has assumed that an express designation of a particular article is the same thing as an express exclusion of all others. If paragraph 463, under which the merchandise was assessed for duty, excludes all combs other than those mentioned therein, it must be held to do so, not by reason of express language to that effect, but because the specific designation of a particular article implies a legislative intent to exclude all others in the absence of any provision of law otherwise directing. The law, however, under which the goods were imported contains an express statutory declaration which does not permit of that implication, and the distinction between an implied exclusion and an express exclusion, ordinarily of little consequence, must be fully respected if effect is to be given to paragraph 481, a very important provision of the tariff act. That paragraph provides—

That each and every imported article, not enumerated * * * which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated * * * as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned.

This provision specifically requires that imported articles which *are not enumerated* shall bear the same duty as articles which *are enumerated*, provided the former be similar to the latter either in material, quality, texture, or use. Such a requirement is wholly irreconcilable with the proposition that the duty imposed in some other part of the statute on a commodity therein specifically designated was intended by the legislature to apply to that commodity and no other. Of course, if Congress had provided in para-

graph 463 for combs made of horn or of horn and metal, but not of gallilith, such a provision would have expressly excluded gallilith combs from that paragraph and made the similitude clause of paragraph 481 inapplicable to the goods under consideration. Not having done so, however, we can not imply that such was its intention in the face of an expressed direction that nonenumerated articles shall carry the same duty as the enumerated articles which such nonenumerated articles most resemble either in material, quality, texture, or use.

It is true that the similitude clause can not be applied to articles which are the same as the enumerated article and which are identical with the latter in material. Such articles are the same and not of a similar kind. The similitude clause is intended to apply only to articles which are different and distinct from the enumerated article, and the duty specifically attached to an article by reason of an improved condition which does not change its essential characteristics can not be affixed by similitude to the same article when not in that condition. So shells washed and cleansed of dirt and animal matter are not *similar* to "shells engraved, cut, ornamented or otherwise manufactured." *Schoenemann v. United States* (119 Fed. Rep., 584. 586). Bisque wares are not *similar* to "bisque wares if painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner." *Fensterer v. Ruhe* (T. D. 31110). The principle that an article can not be made dutiable by similitude to the same article, made of the same material, in a more advanced stage of manufacture, has no application here, however, for the reason that while horn combs and gallilith combs are both combs, they are not combs made of the same material and are therefore distinctly different articles.

So far as we can discover no special tariff provision has ever been made for manufactures of gallilith, and subsequent to the tariff act of 1883 and until the passage of the tariff act of 1909 there was no specific provision for combs of any kind. Consequently gallilith combs brought into the country in 1907 and 1908 were held by the board to be dutiable as nonenumerated manufactured articles. Counsel for the importers argue that Congress must have had that decision in mind when it passed the tariff act of 1909, and that therefore when it provided for "combs composed wholly of horn or composed of horn and metal" it must be assumed that there was no legislative intent to change the rate which had theretofore been fixed by the board for combs made of gallilith. We do not think that such a conclusion legitimately follows or can be properly deduced from the history of the legislation or the facts in the case. A legislative adoption or approval of the interpretation given to any provision of a tariff act by the department of the Government charged

with its execution or by the tribunals required by law to determine its meaning may be presumed when the legislation has been subsequently reenacted by Congress without change or modification affecting the provision interpreted. When, however, the legislation has been subsequently modified in any substantial particular relating to the provision interpreted, no such presumption arises. *United States v. Cerecedo Hermanos y Compañia* (209 U. S., 337-339); *United States v. Falk & Bro.* (204 U. S., 143-152); *Komada & Co. v. United States* (215 U. S., 392-397).

The act of 1897, under which the board decided that gallilith combs must be classified as nonenumerated manufactured articles, made no provision for combs of any kind, and therefore as the law then stood gallilith combs could not be made dutiable as combs either directly or by similitude. The tariff act of 1909 provided for combs made of horn and of horn and metal, and thus opened the door for the application of the similitude clause. We can not, therefore, presume that Congress, when it passed the tariff act of August 5, 1909, intended to continue in force the classification fixed by the board for gallilith combs under the act of 1897. Indeed, to do so would result in the absurdity of holding that the legislature approved and adopted an interpretation of a provision of law which was not in existence at the time the interpretation was made.

The decision of the Board of General Appraisers is *affirmed*.

KAHLEN *v.* UNITED STATES (No. 448).¹

1. "SUITABLE" DEFINED.

In the tariff law "suitable" means actually, practically, and commercially fit.

2. ONIONSKIN PAPER NOT PRINTING PAPER.

The rare and exceptional use of onionskin paper for printing purposes does not constitute it printing paper and it was dutiable as paper not specially provided for under paragraph 402, tariff act of 1897.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23721 (T. D. 30800).

[Affirmed.]

Curie, Smith & Maxwell (W. Wickham Smith and Thomas M. Lane of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified an importation of glazed paper as paper not specially provided for and

¹ Reported in T. D. 31947 (21 Treas. Dec., 381).

assessed it for duty at 25 per cent ad valorem under the provisions of paragraph 402 of the tariff act of July 24, 1897, the material parts of which paragraph read as follows:

402. Paper hangings and paper for screens or fireboards, and all other paper not specially provided for in this act, twenty-five per centum ad valorem; * * *.

The importer claimed that the merchandise was printing paper suitable for books and protested that as such printing paper the goods were dutiable at 15 per cent ad valorem under the provisions of paragraph 396 of said act, the material parts of which are as follows:

396. Printing paper, unsized, sized, or glued, suitable for books and newspapers, * * * valued above five cents per pound, fifteen per centum ad valorem; * * *.

The Board of General Appraisers overruled the protest and the importer appealed.

On the hearing the importer sought to establish by seven dealers in paper, two dealers in book paper, three printers, and one dealer in printer's ink that the paper was suitable for printing books. The testimony of these witnesses was to the effect that judging from the appearance and finish of the paper, it could be printed on and that therefore it could be used and was a suitable paper for printing books. One of the witnesses had seen it used for printing a special edition of the bible, and one knew that it was sometimes used for printing circulars and drug catalogues. The importer himself stated that he had caused books to be printed on the paper in order to demonstrate that it could be used for that purpose. It further appeared from the testimony offered by the importer that the paper in question is variously known to the trade as manifolding paper, printing paper, or wrapping paper, and that it is used for the purposes indicated by those several names. The importer stated that it was also known to the trade as onionskin paper. All of the witnesses agreed that there are but few papers which can not be used for printing, and that most any paper can be printed upon if a suitable ink is employed. One of the witnesses stated that a book could be printed on almost anything in the paper line, and another that books had been printed even on blotting paper.

On the part of the Government, one importer and manufacturer of such paper as that imported, one importer and dealer of papers in general, and three printers testified that the merchandise was not paper suitable for the printing of books, and that although it might be printed upon it was not used by the trade as a printing paper save in exceptional cases. The manufacturers, importers, and dealers stated that the paper was known in the trade as onionskin or manifolding paper, that its introduction did away to a large extent with the old letter-press book, and that it was principally used as a manifolding typewriter paper for the making of carbon copies. The three printers testified that the paper was not suitable for the printing of

books, that it was sometimes used for printing circulars, billheads, letterheads, price lists, and matter where lightness of weight was desired, but that its principal use was that of manifolding paper for making carbon copies on the typewriter; that thin paper is sometimes used in the printing of bibles, but that such paper is generally heavier and less transparent than that which is in controversy. The examiners testified that from 1890 until the filing of the protests in this case in 1902 such paper as that imported had never been classified as printing paper and had always been returned for duty either as a writing paper or as a paper not specially provided for.

After a careful analysis of all the testimony in the case and an examination of the samples in evidence, we think the importer has failed to prove satisfactorily that the imported merchandise is either printing paper or that it is suitable for the printing of books. While the witnesses produced by him testified broadly that the paper in question was printing paper suitable for the printing of books, their statement in that behalf is nothing more than a conclusion drawn by them from the fact that it could be printed upon and that in some exceptional cases it had been actually utilized for the printing of books. Such evidence can hardly be accepted as satisfactory proof of the nature of the goods or their suitability for the purpose alleged, especially when it is considered that it appears from the testimony that almost any paper may serve a printing purpose and that even blotting paper has been used for printing books. From the fact that a thing may be used or has been used for a particular end it does not necessarily follow that it is commercially suitable therefor, and evidence of a casual, incidental, exceptional, or possible use of a thing can not be accepted as proof of its suitability for such use. A house may be built of ice or of paper, but in this country at least such materials would hardly be regarded as suitable building materials. A thing to be suitable, as that term is commonly understood, must be fit and appropriate for the end to which it is to be devoted. In the tariff law the term "suitable" means actually, practically, and commercially fit. The record in this case shows, substantially without contradiction, that onion-skin or manifolding paper is principally used as a typewriter paper for the making of carbon or other copies, and that far from being recognized by the commercial world as a paper suitable for printing books its use for that purpose is so rare that out of the 17 witnesses produced by the Government and the importer on this subject only two ever saw or heard of books being printed on that kind of paper. If the paper in this case should be classified as printing paper suitable for books, there is no reason why blotting paper should not be classified in the same way.

Provision for paper suitable for the printing of books was first made in the tariff law of 1890 and has been continued in every act

since that year. The testimony of the examiners produced by the Government shows that from 1890 down to the date of the filing of the protest in this case paper such as that imported was never once assessed as printing paper suitable for books, which would seem to be confirmatory of the fact that the paper was never recognized by publishers or printers or by importers or dealers in paper as a printing paper commercially adapted to that use.

When Congress fixed a duty on printing paper suitable for books we can not believe that it contemplated the classification of any paper which might be printed upon as printing paper, or that the possible, rare, or exceptional use of a paper for the printing of books would be enough to determine its suitability for that purpose.

The decision of the Board of General Appraisers is *affirmed*.

REVILLON FRÈRES v. UNITED STATES (No. 461).¹

PONY SKINS, DRESSED FURS ON THE SKIN.

Pony skins are not "furs" or "fur skins" in the common, ordinary meaning of those words, but the evidence seems to make it clear that for several years before the enactment of the tariff law of 1909 pony skins had been dealt in commercially precisely as true fur skins and employed as such in manufacture; they are dutiable as dressed fur skins under paragraph 439, tariff act of 1909.—*United States v. Bennett* (66 Fed. Rep., 299).

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers G. A. 7079 (T. D. 30798).

[Affirmed.]

B. A. Levett for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case raised the question as to the proper classification of certain "pony skins" imported into the country at the port of New York and assessed for duty by the collector as "dressed furs on the skin," at 20 per cent ad valorem under the provisions of paragraph 439 of the tariff act of August 5, 1909, which reads as follows:

439. Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem; articles of wearing apparel of every description, partly or wholly manufactured, composed of or of which fur is the component material of chief value, fifty per centum ad valorem. Furs not on the skin, prepared for hatters' use, including fur skins carotod, twenty per centum ad valorem.

¹ Reported in T. D. 31948 (21 Treas. Dec., 384).

The importers protested that the goods were either dutiable at 15 per cent ad valorem under paragraph 451 or free of duty under paragraph 676, the pertinent provisions of which paragraphs are as follows:

451. * * * Kangaroo, sheep, and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specifically provided for in this section, fifteen per centum ad valorem; * * *.

Free list.—That on and after the day following the passage of this act, except as otherwise specially provided for in this act, the articles mentioned in the following paragraphs shall, when imported into the United States * * * be exempt from duty:

* * * * *
676. Skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this section.

The debatable issue raised by the classification of the collector and the protest of the importer is whether the pony skins so imported are furs or fur skins in fact, and if not, whether, by commercial usage and custom at and prior to the tariff act of August 5, 1909, they had come to be so regarded, treated, and understood by the trade.

The Board of General Appraisers overruled the protest, and the importers appealed.

Counsel for the appellants contend that the goods are not furs or fur skins within the ordinary meaning of those words or as known to the trade, and that therefore they should be assessed for duty as "other skins" under paragraph 451 or admitted free as "hides not specially provided for" under paragraph 676.

As defined by the standard authorities, "fur" is the short, soft, fine, curly, silky, or downy hair which covers the skin of certain animals and is protected by a straight, smooth, comparatively rigid hair intermingled with it. (Standard Dictionary; Encyclopedia Britannica, 11th ed., Vol. XI.)

The evidence shows that the pony skins are covered with the latter class of hair only, and therefore they are not "furs" or "fur skins," giving to those words their common, ordinary meaning. Whether the merchandise can be classified as "furs" or "fur skins" would seem to depend consequently on whether trade usage and custom has given to the word "fur" a broader signification than that popularly accorded to it and, failing that, on the applicability of the similitude clause.

The case appears to have been tried to some extent on the theory that the commercial meaning of "dressed furs" and of "furs dressed on the skin," and not that of "furs" or "fur skins," was the question to be solved, and as a result there were differences in statement which seemingly left several of the witnesses at variance with themselves and one another. Quite naturally most, if not all, of the

witnesses, both for the Government and for the importers, testified that pony skins were not ordered, bought, and sold as "dressed furs" or as "furs dressed on the skin." At the same time it was made perfectly clear by the testimony that no skins, whether true furs or not, were so ordered, bought, or sold. Such expressions are too indefinite for commercial transactions, and necessarily more specific language must be used by buyer and seller if the one is to understand and the other to secure what is wanted.

It seems to be established by witnesses for the Government and the importers that when fur skins, dressed fur skins, or dressed furs are referred to in the trade they are generally spoken of as "skins," or "dressed skins," which terms are considered and understood by the trade as synonymous with the longer expressions. Consequently, when ordering, buying, or selling the skins of the otter, beaver, or muskrat, which are true fur-bearing animals, they are not ordered, bought, or sold as "fur skins" or "dressed furs" or "furs dressed on the skin," or as otter, beaver, or muskrat fur skins, or as otter, beaver, or muskrat fur skins dressed, but as otter, beaver, or muskrat "skins," natural or dressed as the case may demand. Ellipsis is as much in use in the business as in the literary world, and whether an order is given for "skins" or "fur skins," "dressed skins," or "dressed fur skins," the meaning is just the same to a trade which requires for its uses only "skins" which serve the purposes of fur skins.

A careful analysis of all the testimony leaves no doubt in our minds that for the six or seven years immediately prior to the tariff act of August 5, 1909, pony skins of the class of the importation here under consideration were uniformly bought and sold in precisely the same way as were true fur skins. They were then and are now imported into the country by importers of furs, bought and sold by furriers, dressed and dyed by dressers and dyers of furs, and made up into fur garments by manufacturers of fur wearing apparel. They were then and are now definitely, uniformly, generally, and not personally, partially, or locally, treated and used by the fur trade as a fur. In the light of these facts, which we consider clearly proved by the evidence, we see no escape from the conclusion that this case is on "all fours" with *United States v. Bennett* (66 Fed. Rep., 299) and that at and prior to the passage of the tariff act of August 5, 1909, trade usage and custom had so far crystallized as to give to the term "fur skins" a definite, uniform, and general signification broader than its ordinary meaning and sufficiently comprehensive to embrace the pony skins in question.

As we are of opinion that pony skins are fur skins within the provisions of paragraph 439, the claim that they are entitled to free entry as "hides not specially provided for" can not be sustained.

The decision of the Board of General Appraisers is *affirmed*.

MORGENSTERN & Co. v. UNITED STATES (No. 481).¹

PERBORATE OF SODIUM, A CHEMICAL COMPOUND.

Under neither the tariff act of 1897 nor the tariff act of 1909 may perborate of sodium be classed as borate material. It is the product of a chemical reaction, is a chemical compound, and dutiable as such under paragraph 3 of each of said acts.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23840 (T. D. 30865).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The merchandise involved in this case is perborate of sodium imported under the tariff acts of 1897 and 1909. This perborate was classified by the collector of customs as a chemical compound not specially provided for and that part of it which was imported under the tariff act of 1897 was assessed for duty under the following paragraph thereof:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all *chemical compounds* and salts not specially provided for in this act, *twenty-five per centum ad valorem*.

The perborate which was imported under the tariff act of 1909 was assessed for duty under paragraph 3 thereof, which is as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all *chemical compounds*, mixtures and salts, and all greases, not specially provided for in this section, *twenty-five per centum ad valorem*; chemical compounds, mixtures and salts containing alcohol or in the preparation of which alcohol is used, and not specially provided for in this section, fifty-five cents per pound, but in no case shall any of the foregoing pay less than twenty-five per centum ad valorem.

The importers protested that all of the merchandise whether imported under the tariff act of 1897 or under that of 1909 was dutiable as a borate material under the following paragraphs of said acts:

Act of 1897:

11. Borax, five cents per pound; borates of lime or soda, or other borate material not otherwise provided for, containing more than thirty-six per centum of anhydrous boracic acid, four cents per pound; borates of lime or soda, or *other borate material not otherwise provided for, containing not more than thirty-six per centum of anhydrous boracic acid, three cents per pound*.

Act of 1909:

11. Borax, two cents per pound; borates of lime, soda, or *other borate material not otherwise provided for in this section, two cents per pound*.

¹ Reported in T. D. 31949 (21 Treas. Dec., 387).

The Board of General Appraisers overruled the protests and the importers appealed. The evidence shows that perborate of sodium is a comparatively recent creation of the chemical laboratory and that it is not found in a state of nature. It is manufactured by bringing together borate of sodium and peroxide of hydrogen in such a way that a chemical reaction is caused, as a result of which perborate of sodium is produced. There are some differences between the witnesses as to the chemical formula of borate of soda, and none of them is wholly sustained by chemical treatises on the subject. The testimony, however, is uncontradicted that perborate of sodium contains one atom more of oxygen than does the borate and that chemically speaking they are different articles. From this evidence the conclusion must be drawn that the perborate of sodium is not borate of soda, and that as it is the product of a true chemical reaction artificially produced, it is a chemical compound.

Counsel for the importers contend, however, that the merchandise in question is a *borate material*, and that as the provision for borate material in paragraph 11 of both acts is narrower and more specific than that for chemical compounds in paragraph 3 it should be classified under the former paragraph instead of the latter. We can not wholly agree with this contention. The expression "borates of lime and soda, or other borate material" in paragraph 11 of the tariff act of 1897 and the expression "borates of lime, soda, or other borate material" in paragraph 11 of the tariff act of 1909 were, in our opinion, intended to cover only those borate materials which are found in nature and were not meant to embrace borates artificially produced. The borate of lime and borate of soda referred to in these paragraphs as borate materials are crude, natural products, from which it is commercially practicable to manufacture borax, boracic acid, and chemically prepared borates, and the phrase "other borate material" must on the principle of *noscitur a sociis* be held to refer to like natural substances. *Hempstead v. Thomas* (129 Fed. Rep., 907). Counsel takes exception to the *Hempstead* case as authority and argues that as there are in nature no borate materials which contain more than 36 per cent of anhydrous boracic acid the interpretation there given to paragraph 11 of the tariff act of 1897 would render inoperative and of no effect that part of it which imposes a duty on borate materials containing more than 36 per cent of anhydrous boracic acid. In answer to this objection to the authority of the *Hempstead* case it might be sufficient to say that a reference to scientific works other than those mentioned by the witnesses shows that sassoline, a native boric acid found in the hot springs of Sasso, Tuscany, contains 56.45 per cent of anhydrous boric or boracic acid. (Wagner's Chemical Technology, p. 427.)

From this work and Spon's Encyclopedia it also appears that very high percentages of boracic acid are found in other natural products, such as tincal or crude borax, which contains 36.53 per cent; rhodite, which contains from 30 to 45 per cent; boracite or magnesium borate and chlorate, which contains 62.5 per cent; hayescine, tiza, or calcium borate, which contains from 30 to 44 per cent. (Wagner's Chemical Technology, p. 427; Spon's Encyclopedia, vol. 1, pp. 526-527.) Possibly a percentage of more than 36 per cent of anhydrous boracic acid in native borates is confined to sassoline or is so exceptional that the difference between scientific authorities may be accounted for by the rarity of its occurrence. But however that may be, the very fact that more than 36 per cent of anhydrous boracic acid is claimed for such a large source of supply as the springs of Sasso, the uncertainty as to whether as large a percentage might not be found in other natural substances, and the existence of a difference of opinion as to maximum percentages contained in native materials, were ample justification for the distinction made by Congress in a protective tariff between borates containing more and borates containing less than 36 per cent of anhydrous boracic acid, and from that distinction it can not be logically deduced that the provision was intended to cover both manufactured and native borates. That Congress regarded or could have regarded manufactured borates as borate material, that is, a material for the making of borates, does not seem to us probable or reasonable in view of the fact that such a use of manufactured borates was commercially impracticable. Manufactured borates are made by combining boracic acid with a metal base, and as boracic acid is derived from natural substances it seems to follow that the cost of production alone would absolutely preclude the commercial manufacture of borates from borates artificially evolved. The use of manufactured borates to make other borates necessarily implies the development of boracic acid from native products, its combination with some metal, and then its redevelopment in order to combine it with another. On its face such a method of making borates is needlessly costly and too circuitous for practical commercial use. We can not, therefore, assume or presume that the legislature ever intended that the term "borate material" should cover or include manufactured borates.

But whether the expression "other borate material" refers exclusively to natural products or includes both native and artificial borates, we think that perborate of sodium can not be regarded as a material on the evidence presented in the record. A material is not merely a substance—an article—but a substance, matter, article, or thing from which some other substance, matter, article, or thing is to be produced, manufactured, constructed, or made. Perborate

of sodium is manufactured for use in laundries as a cleansing agent, for bleaching, and for antiseptic and other medical purposes. It is itself a finished manufactured product evolved from borate materials, and, so far as the evidence discloses, it is not intended nor is it commercially available as a material for the manufacture of borates, or of anything else for that matter.

The decision of the Board of General Appraisers is *affirmed*.

QUAINTANCE v. UNITED STATES (No. 497).¹

1. FIGURED COTTON CLOTH APPRAISED AS AN ENTIRETY.

In appraising the value of figured cotton cloth, the threads added to constitute the figure are not to be omitted in the valuation, but these, together with the foundation threads, are to be taken into account in fixing ad valorem rates under paragraphs 305 and 306, tariff act of 1897.

2. SECTION 19, CUSTOMS ADMINISTRATIVE ACT OF 1890.

Section 19, customs administrative act, 1890, providing in effect that imported merchandise subject to an ad valorem duty shall be valued in the condition in which it is imported, requires that the value of the added threads should be computed.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7105 (T. D. 30968).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and George J. Puckhafer of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (Thomas J. Doherty on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

Certain figured cotton cloth containing other than ordinary warp and filling threads was assessed for duty at 25 per cent, 30 per cent, and 35 per cent ad valorem according to its value under the provisions of paragraphs 305 and 306 of the tariff act of July 24, 1897, and in addition 2 cents per square yard under the provisions of paragraph 313 of the same act.

Paragraphs 305 and 306 being typical of each other, one only is inserted here.

306. Cotton cloth, not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and not exceeding one hundred and fifty threads to the square inch, counting the warp and filling, and not exceeding four square yards to the pound, one and one-half cents per square yard; exceeding four and not exceeding six square yards to the pound, two cents per square yard; exceeding six and not exceeding eight square yards to the pound, two and one-half cents per square yard; exceeding eight square yards to the pound, two and three-fourths cents per square yard; if bleached, and not exceeding four square yards to the pound, two and one-half cents per square

¹ Reported in T. D. 31950 (21 Treas. Dec., 390).

yard; exceeding four and not exceeding six square yards to the pound, three cents per square yard; exceeding six and not exceeding eight square yards to the pound, three and one-half cents per square yard; exceeding eight square yards to the pound, three and three-fourths cents per square yard; if dyed, colored, stained, painted, or printed, and not exceeding four square yards to the pound, three and one-half cents per square yard; exceeding four and not exceeding six square yards to the pound, three and three-fourths cents per square yard; exceeding six and not exceeding eight square yards to the pound, four and one-fourth cents per square yard; exceeding eight square yards to the pound, four and one-half cents per square yard: *Provided*, That on all cotton cloth exceeding one hundred and not exceeding one hundred and fifty threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over nine cents per square yard, thirty per centum ad valorem; bleached, valued at over eleven cents per square yard, thirty-five per centum ad valorem; dyed, colored, stained, painted, or printed, valued at over twelve and one-half cents per square yard, there shall be levied, collected, and paid a duty of thirty-five per centum ad valorem.

The construction thereof also being involved in the determination of this appeal, paragraphs 310 and 313 are inserted.

310. The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton in the piece or otherwise, whether figured, fancy, or plain, the warp and filling threads of which can be counted by unraveling or other practicable means.

313. Cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted, or printed, shall pay, in addition to the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard, and two cents per square yard if valued at more than seven cents per square yard.

The appellant contends that, in order to determine the value of the cloth in question for the purpose of ascertaining whether or not the value will bring it within the terms of the ad valorem provisos in paragraphs 305 and 306, the collector should take the value only of what is termed the foundation fabric of the cloth, which means the cloth as it would be if it did not contain other than the ordinary warp and filling threads and the figures or designs produced thereby; or, in other words, that for the purpose of ascertaining whether the ad valorem provisos of paragraph 305 or 306 apply to cotton cloth containing other than the ordinary warp and filling threads, the value of the foundation fabric only shall be considered. This contention involves the collateral one that, when the ascertained value of such foundation fabric is less than the minimum value named in the provisos, duty should be taken only at the specific rates named in the body of paragraph 305 or 306 plus the additional duty applicable under paragraph 313, and also that, in the event the value of the foundation fabric carries it into the proviso of either of the paragraphs, the ad valorem rates therein named should be taken only on the value of the foundation fabric and not on the value of the cloth reported, entered, and appraised.

The contention of the Government is that the foreign market value of the cloth at the time of its importation in its condition as imported is to be the guide in determining whether a specific or an ad valorem rate of duty shall be assessed under paragraphs 305 and 306 and that, if ad valorem, the rate thereof shall be applied to such foreign market value to which specific or ad valorem rates, as the case may be, the applicable extra duty under paragraph 313 shall be added.

The assessment in this case was made by the collector consistent with the Government's claim and his action was sustained by the Board of General Appraisers.

The determination of this question involves an examination of paragraph 313, especially of the words "cotton cloth * * * shall pay in addition to the duty herein provided for other cotton cloth of the same description or condition, weight, and count of threads to the square inch, 1 cent per yard if valued at not more than 7 cents per square yard, and 2 cents per square yard if valued at more than 7 cents per square yard."

It is manifest, when cotton cloth is subject to the provisions of paragraph 313, as is conceded to be the case here, that other paragraphs must be referred to in order to ascertain the initial duty; that is, "the duty herein provided for other cotton cloth of the same description, or condition, weight, and count of threads to the square inch," in addition to which paragraph 313 imposes a duty of 1 cent per square yard if the cloth is valued at no more than 7 cents per square yard and 2 cents per square yard if valued at more than 7 cents per square yard.

The paragraphs to be referred to for that purpose in this case are paragraphs 305 and 306, which are known as countable paragraphs of the cotton schedule. As the same observations apply to each, paragraph 306 only will be referred to.

The main body of this paragraph shows that the elements for determining specific duty rates thereunder of cotton cloth which would be cotton cloth as defined in paragraph 310 are, count of threads to the square inch, conditions as to bleaching, dyeing, etc., and weight per square yard, while, under the proviso thereto, such cloth of a certain count of warp and filling threads per square inch and valued at certain varying amounts per square yard is made subject to certain ad valorem duties depending upon whether the cloth is or is not bleached or dyed, colored, stained, painted, or printed, as the case may be.

Now, the real question here is whether the collector, when he valued the cotton cloth in this case, had a right to take the value of the cloth just as he found it, in the condition in which it was imported, or whether it was his duty to consider the cloth as consisting of two parts, one part the foundation fabric and the other part the other

than the ordinary warp and filling threads found in or on the foundation fabric, which were concededly introduced to form a figure or design—that is, analyzed still further, should he, for the purposes of ascertaining the value of this cotton cloth, theoretically divide it into two parts, taking the value of only one of them for the purpose of ascertaining the ad valorem duty to which the cloth should be subject, notwithstanding the cloth was made, imported, and designed to be sold as an entirety.

Appellant urges, as one reason why the value only of the foundation fabric should be taken into consideration in determining what rate of duty should apply under paragraph 306, that it has been held, that for the purpose of ascertaining the number of warp and woof threads to the square inch, such threads in the foundation fabric only must be counted, and we are cited to *Hedden v. Robertson* (151 U. S., 520) upon this point.

An examination of the opinion in that case discloses that the importation was cotton cloth, the groundwork of which was uniform and upon which were figures or patterns woven contemporaneously with the weaving of the fabric. Apparently it resembles the importations in this case. The importer there contended that the cotton cloth was dutiable as a manufacture of cotton and not as cotton cloth. The Supreme Court held that the merchandise was dutiable as cotton cloth under the appropriate countable paragraph of the cotton schedule, saying in effect that, the warp and woof threads of such groundwork being countable, the goods were dutiable as cotton cloth by the express language of the statute. In other words, it decided that the extraordinary threads which made the superimposed figures or patterns upon the cloth should not be counted in determining the number of warp and filling threads to the square inch.

It is further urged that in *United States v. Rusch* (167 Fed. Rep., 523), it was held by the Circuit Court of Appeals that upon the question of condition of cotton cloth, that is, as to whether colored or not, only the warp and woof threads of the foundation fabric should be considered. In that case the warp and woof threads of the foundation fabric were uncolored, but other than ordinary warp and woof threads had been used to embellish the cloth, of such a color and to such an extent that in some instances the finished fabric appeared to the eye to be colored, with white ornamentations.

The court held that in determining whether the cloth was unbleached, bleached, colored, stained, painted, or printed, regard only should be had to the foundation fabric. It was conceded and held that if any threads of the warp and filling of the foundation fabric were colored the classification would thereby be changed.

The Supreme Court denied a petition for a writ of certiorari in this case. *United States v. Rusch* (214 U. S., 525).

It is claimed that inasmuch as these cases settle the law that for count of threads and for determination of color of cotton cloth which is subject to paragraph 306 and also to the additional duty provided in paragraph 313, reference can only be had to the foundation fabric, it logically follows that in order to ascertain the *value* of such cotton cloth resort should also be had only to such foundation fabric.

This leads to a consideration of what Congress intended by the enactment of paragraph 313, which first appears in the tariff act of 1897. It was manifestly intended to subject to an additional duty the cloth therein described, which was new to the trade and was the result of the use of improved mechanical appliances in its production. It was apparently thought that the countable paragraphs did not impose a sufficient rate of duty thereon, and so the additional rate of 1 or 2 cents per square yard, as the case might be, was provided for.

The evident intent of Congress in dealing with the subject of cotton cloth is to increase the amount of the tax thereon as the cloth becomes more expensive, and paragraph 313 was plainly enacted to further that intent. This can best be accomplished by making the value of the cotton cloth one of the factors to determine the assessment of duty.

And now comes the crux of the case—shall it be the value of the foundation fabric or of the finished cloth. The importer says the former because two factors, namely, count of threads and condition of color, are to be determined in that manner. If by so doing the manifest purpose of paragraph 313 can be carried out, it would seem to be the proper course to pursue. We proceed to test his claim in that regard. Assume a certain foundation fabric, a plain cloth, exceeding 100 and not exceeding 150 threads to the square inch, the warp and filling threads of which are not bleached, dyed, colored, stained, painted, or printed, is valued at 10 cents per square yard under paragraph 306. It is then subject to a duty under that paragraph of 30 per cent *ad valorem*. Suppose the same foundation fabric be so manufactured that under paragraph 313 it is worth in its various conditions, one product 12 cents, another 14 cents, another 16 cents, another 18 cents, and another 20 cents per square yard. Applying the rule the importer contends for, we have the following results: The plain cloth pays a duty of 3 cents per square yard; when ornamented so as to be worth 12 cents per square yard, applying paragraph 313, it pays a duty of 5 cents per square yard, and this duty is not increased, although the ornamented fabric be worth 20 cents per square yard. If the value of the cotton cloth and not the foundation fabric be taken as the factor, the results would be as follows: Plain cloth, 3 cents per square yard; figured cloth, valued at 12 cents per square yard, 5.6 cents duty per square yard; valued at 14 cents, duty 6.2 cents; valued at 16 cents, duty 6.8

cents; valued at 18 cents, duty 7.4 cents; valued at 20 cents, duty 8 cents. In other words, a rate of duty increasing as the value of the cotton cloth itself increases by the common difference of 30 per cent of the difference in value.

Other illustrations readily suggest themselves applicable to the various features of the case, any of which we think demonstrates that the rule for which the importer contends defeats the very purpose of the paragraph. The reason is that the value which he contends should be the factor is in each given case constant and does not vary as the value of the cotton cloth itself varies.

The case of the *United States v. Riggs* (203 U. S., 136) is cited by the Government as conclusive of the case in its favor. We think it can hardly be said to be so, as the question involved was whether the additional duty imposed under paragraph 313 could be added to the ad valorem tax imposed under paragraph 306 or whether it should be restricted to the specific tax imposed thereby. The court held it should be added to either, as the case might require.

An examination of the decision of the board and of all the cases through which that case passed in reaching the Supreme Court, including the opinion there, suggests that the value upon which the duty was assessed was that of the figured cotton cloth as imported and not of the foundation fabric, but this, however, is not entirely clear. The court did, however, clearly hold that the object of paragraph 313 was to aid in the general scheme of the tariff act of raising the amount of tax as the cloth becomes more expensive, and that the paragraph was "intended to hit all cotton cloth and all values and is intended to be added to a tax already imposed."

Section 19 of the customs administrative act of June 10, 1890, provides in effect that imported merchandise subject to an ad valorem rate of duty shall be valued in the condition in which it is imported, and so far as applicable here seems to require the conclusion which we reach.

Under the countable paragraphs, it is the duty of the collector to value the cotton cloth in question. He may count the threads of the foundation fabric for the purpose of ascertaining under which paragraph the importation falls in that regard; he may apply the other tests prescribed in the countable paragraph in order to determine its classification thereunder and the consequent rate of duty; but when he undertakes to ascertain and determine the value, we think it is clear that but one course is left open to him—that is, to find its value in the condition in which it is imported as an entirety.

As applicable to importations of other merchandise, this is but a reiteration of what this court has already held. *Moore v. United States* (1 Ct. Cust. Appls., 115; T. D. 31117); *United States v. Viotor* ¹ Ct. Cust. Appls., 297; T. D. 31355).

Only in this way can the purpose of Congress be carried out and a tax imposed on cotton cloth that will increase as the cloth itself becomes more expensive.

The decision of the board is *affirmed*.

HENSEL v. UNITED STATES (No. 529).¹

SEAMLESS FLEXIBLE COPPER TUBING.

Generally speaking, "pipe" implies an article tubular in form and rigid, while "tubing" implies an article that is flexible. Paragraph 151, tariff act of 1909, provides in precise language for flexible metal tubing or hose, and this being a more specific, definite enumeration than "copper pipes," the importation was dutiable not under paragraph 176 of that act, but under paragraph 151.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24104 (T. D. 31020).

[*Affirmed.*]

John Giblon Duffy (*Joseph G. Kammerlohr* of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

A consignment of seamless flexible copper tubing or hose imported at the port of New York was assessed for duty by the collector of customs at 30 per cent ad valorem under the provisions of paragraph 151 of the tariff act of August 5, 1909. The following is the part of the paragraph which is material to the case:

151. * * * Flexible metal tubing or hose, not specially provided for in this section, whether covered with wire or other material, or otherwise, including any appliances or attachments affixed thereto, thirty per centum ad valorem; * * *

The importers protested against the assessment in due time and form, and among other grounds of protest, which it is unnecessary to consider, set up that the merchandise was dutiable at 2 cents per pound under paragraph 176, which reads as follows:

176. Copper, in rolled plates, called braziers' copper, sheets, rods, pipes, and copper bottoms, two and one-half cents per pound; sheathing or yellow metal of which copper is the component material of chief value, and not composed wholly or in part of iron ungalvanized, two cents per pound.

The Board of General Appraisers overruled the protest and the importers appealed.

The collector found and the appraiser reported that the merchandise was seamless flexible metal hose or tubing. No evidence to the con-

¹ Reported in T. D. 31951 (21 Treas. Dec., 396).

trary was introduced on the hearing. The board finds and counsel for the importers admit that the goods are flexible copper tubing or hose. On this state of the record there is but one point presented for decision, Is flexible copper tubing or hose provided for in any paragraph or section of the tariff act other than paragraph 151? Counsel for the importers contend that flexible copper tubing or hose is specially provided for in paragraph 176. We think this contention can not be sustained, even if it be assumed that a proper basis for it was laid in the protest. Paragraph 176 fixes a duty of 2½ cents per pound on copper pipes, not on copper tubing, and much less on flexible copper tubing or hose. While the words "pipe" and "tube" are frequently used interchangeably, there is, after all, a distinction between them. Generally speaking, pipe implies an article of tubular form which is rigid and tubing an article which is flexible. (Standard Dictionary.) However, section 151, in precise language, provides for flexible metal tubing or hose, and we must consider this a more specific and definite enumeration of the article imported than one for "copper pipes."

The decision of the Board of General Appraisers is *affirmed*.

SIMPSON *v.* UNITED STATES (No. 530). VANDEGRIFT *v.* UNITED STATES (No. 531).¹

COTTON WASTE, NOT ADVANCED IN VALUE.

Cotton waste recovered from mill sweepings or used cotton waste is not "advanced in value" by processes of combing, washing, and bleaching in the sense implied by "advanced in value" appearing in section 313, tariff act of 1909. It is entitled to free entry under that act.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7111 (T. D. 31001).

[Reversed.]

Comstock & Washburn (Albert H. Washburn and J. Stuart Tompkins of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Martin T. Baldwin on the brief), for the United States.

Before MONTGOMÉRY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain cotton waste imported at Philadelphia was classified by the collector of customs as cotton waste advanced in value and assessed for duty at 20 per cent ad valorem under the provisions of paragraph 313 of the tariff act of August 5, 1909, the part of which material to the case is as follows:

313. * * * Cotton waste and flocks manufactured or otherwise advanced in value, twenty per centum ad valorem.

¹ Reported in T. D. 31952 (21 Treas. Dec., 397).

The importers protested that the merchandise was not cotton waste advanced in value, but that it was cotton waste entitled to free entry under paragraph 548 of the free list, which paragraph is as follows:

548. Cotton, and cotton waste or flocks.

The Board of General Appraisers sustained the protest as to 10 bales of the importation described as "pulled waste" and overruled it as to that part denominated "washed or bleached waste." From the decision, in so far as it overruled the protest, the importers appealed. No appeal was taken by the Government from that part of the decision sustaining the protest as to 10 bales of pulled waste.

The facts in the case are practically undisputed and are about as follows: The goods in question are the product either of cotton waste which has been used for cleaning machinery or of the mill sweepings of cotton mills or of a mixture of both. The cotton waste which has been used to clean machinery is of course impregnated with oil and dirt and thereby has lost its usefulness to the consumer as a cotton waste. The mill sweepings are made up of soiled cotton waste and of dirt, bits of leather, and other refuse swept up from the floors of the mills. Neither mill sweepings nor used cotton waste would be accepted as a good delivery of the lowest grade of cotton waste. The payment of freight on a high percentage of unserviceable material and the inflammable nature of oil-soaked cotton practically precludes the importation into this country of used cotton waste or of mill sweepings. The mill sweepings and used cotton waste are in fact a spoiled cotton waste and have no value in their foul condition either to the consumer or the manufacturer of cotton waste. Mill sweepings and used cotton waste are not thrown away, however, as worthless refuse, but are sold to those who make a business of bringing such materials to some degree of usefulness as cotton waste by separating the cotton fiber therein from its impurities. This is accomplished by putting the material through a machine which combs out the dirt and all other foreign matter, with the exception of the oil and grease absorbed by the fiber. The oil and grease, if any there be, are then eliminated by washing the cotton with water and acids. Although this washing bleaches the material to some extent, it is fairly evident that the primary purpose of the washing is not to bleach but to cleanse, and that whatever of bleaching results from the use of acid to remove grease and oil is more than counterbalanced by injury done to the fiber. If the product is cleaned solely by combing out the dirt it is "pulled waste." If it is cleaned by washing it is called "washed waste." From mill sweepings about 50 per cent of available material can be recovered; that is to say, 10,000 pounds of mill sweepings will produce about 5,000 pounds of pulled waste which, if it contains oil or grease, must be

further treated by washing with water and acid before it reaches the stage of a very low grade of cotton waste.

The cotton waste which is recovered by these processes is not and could not be sold to the consumer as a cotton waste, but is mixed by the manufacturer with 75 per cent of No. 1 white waste. The cost of No. 1 white waste to the manufacturer is from 6 to 9 cents per pound, and as he receives for the finished product not more than from $8\frac{1}{2}$ to 9 cents per pound, the adulterant may be said to represent his margin of profit. Used cotton waste and mill sweepings are bought and sold in Europe at prices which run from five-eighths of 1 cent per pound to $1\frac{1}{2}$ cents per pound. The average price of "pulled waste" and "washed waste" in the same market averages about $3\frac{1}{4}$ cents per pound.

As popularly understood, cotton waste is that refuse of cotton manufacture which is used to clean machinery and as packing for axle boxes (Standard Dictionary; Century Dictionary), and so far as the evidence discloses that same understanding of the term attaches to it in the trade. Manifestly, and as appears from the record, mill sweepings and used cotton waste are not fit to clean machinery or pack axle boxes. With these as the facts in the case we do not see how it is possible to escape the following conclusions:

First. That mill sweepings and used cotton waste are not cotton waste within the trade or popular understanding of that term, and that the cotton fiber which is a constituent part of such sweepings and used cotton waste ceased to be cotton waste when it became so contaminated with dirt, grease, oil, and other foreign matter that it was no longer serviceable or marketable as cotton waste.

Second, that mill sweepings and used cotton waste are nothing more than the crude materials from which a cotton waste may be reclaimed or recovered.

Third, that the cotton waste so reclaimed or recovered is at best one of the lowest grades of cotton waste and is of such an inferior quality that it is not salable to the consumer, but is serviceable only to the manufacturer of cotton waste, who mixes it with No. 1 cotton waste and utilizes it as an adulterant to reduce the cost of making merchantable cotton waste.

Fourth, that while mill sweepings and used cotton waste have been advanced in condition by converting them into a cotton waste of low grade, the cotton waste so evolved has not itself been advanced in condition or subjected to further treatment or processing to advance its value.

It appearing to our satisfaction that the cotton waste under discussion is a reclaimed or recovered cotton waste of low grade; that it has not been restored to its natural state, much less advanced

beyond that condition; that it was not manufactured or advanced in value after its restoration to the status of a cotton waste; and that it is inferior to the normal cotton waste, which, although worth nearly twice as much, is admitted free of duty, we must decide that the importation is entitled to free entry. To hold otherwise would mean that a cotton waste just as it falls from the mill must be admitted free and that an inferior cotton waste recovered from the same material after it has become refuse by use or otherwise can not be so admitted, which would be an anomaly the introduction of which into the tariff law of 1909 we can not assume was the real intention of Congress.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES v. MEYERSON (No. 547).¹

CARDBOARD EMBOSSED TO IMITATE LEATHER.

Plain cardboard that has been embossed to give it an appearance of grain leather by passing it between a smooth and an indented roller remains cardboard; and it is not dutiable as paper, but as cardboard, under paragraph 415, tariff act of 1909.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7078 (T. D. 30826).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Harvey T. Andrews for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain merchandise imported into the country at the port of New York was classified as uncoated paper with a surface design not produced by lithographic processes, and assessed for duty by the collector at 4½ cents per pound under the following provisions of paragraph 411 of the tariff act of August 5, 1909:

411. * * * Papers, including wrapping paper, with the surface decorated or covered with a design, fancy effect, pattern or character, whether produced in the pulp or otherwise, but not by lithographic process, four and one-half cents per pound; * * *.

Other merchandise of the very same kind, except that it lacked the surface design, was subjected to duty as *cardboard* at 35 per cent ad valorem under the provisions of paragraph 415.

To the classification and duty assessed the importer objected in due time and as reasons for his objection thereto set up in his protest that

¹ Reported in T. D. 31953 (21 Treas. Dec., 400).

all of the merchandise was properly dutiable at 35 per cent ad valorem under paragraph 415 of said act, the part of which paragraph material to this case is as follows:

415. Jacquard designs on ruled paper, or cut on Jacquard cards, and parts of such designs, *cardboard* and bristol board, thirty-five per centum ad valorem; * * *.

The Board of General Appraisers sustained the protest and the Government appealed.

The goods were reported by the appraiser as follows:

(A) Plain paper boards intended to be used in the manufacture of suit cases, dutiable as cardboard at 35 per cent ad valorem under paragraph 415.

(B) Paper boards the same as A, except that they have an embossed design in imitation of the grain in leather, dutiable as paper with a surface design at 4½ cents per pound under paragraph 411.

From the uncontradicted evidence produced on the hearing the following facts appear to be established:

The goods are manufactured from paper pulp and belong to that class of manufactures from pulp known as cardboard. Cardboard is distinguished from paper as commonly understood in this, that it is thicker and heavier, stiffer and less flexible. Cardboard is not made on the usual paper machine, but on a special machine which winds up on a cylinder sufficient pulp or several layers of pulp to constitute the thickness required. It is not dried on the cylinders as is paper. Neither is it calendered in the same way. The board is taken from the cylinder wet and is dried in the air, which gives it a stiffness not possessed by paper. Moreover, as it can not be wound on the cylinder without splitting, it is calendered in sheets and not on the roll, as is paper. To make plain board the pulp is run through smooth rollers. Embossed board is produced by passing the pulp between a smooth roller and an indented roller. The testimony further discloses that cardboard is the generic name for paper boards and that in trade and commerce that term embraces the various boards, which, on account of their color and appearance and the pulp material of which they are made, have received such special names as wood board, strawboard, chip board, plain board, red fiber board, embossed-leather board, and so forth. As already stated, the plain board in this case was classified by the collector as *cardboard*, while the embossed board, composed of the same material, manufactured in the same way, intended for the same general uses, and differing in no way from the plain board, except that it had been given the appearance of grain leather with an indented roller, was classified as *paper*. Such a difference in classification may have been moved by considerations of the higher duty, but that classification can scarcely be said to be distinguished by its consistency.

On this evidence and on the record submitted in T. D. 30826 the board found that the merchandise was "leather board," a special grade of paper board belonging to the general class of goods commercially known as cardboard, and that it was therefore dutiable at 35 per cent ad valorem under the provisions of paragraph 415. This finding is fully sustained by the evidence, and the decision of the Board of General Appraisers is therefore *affirmed*.

UNITED STATES v. BOUCHSEIN (No. 582).¹

SCHAPPE SILK YARNS, CONDITIONED.

The testimony shows such a general trade adoption of and acquiescence in the conditioning rule for finding the number to be assigned schappe silk yarns according to the metric system, that the reference to this system in paragraph 397, tariff act of 1909, may be fairly held to indicate this conditioning rule as a proper guide. This conditioning rule having been complied with in the case here, there is no error in the appraisement.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7147 (T. D. 31181).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Nathaniel Levy for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellee imported into this country a consignment of schappe silk yarn. It is conceded that the merchandise was dutiable under paragraph 397 of that act.

The pertinent parts of the paragraph read as follows:

397. Spun silk or schappe silk yarn * * * if valued at exceeding one dollar per pound, in the gray, in skeins * * * if advanced beyond the condition of singles by grouping or twisting two or more yarns together, on all numbers up to and including number two hundred and five, fifty cents per pound, and in addition thereto ten one-hundredths of one cent per number per pound; exceeding number two hundred and five, fifty cents per pound, and in addition thereto fifteen one-hundredths of one cent per number per pound * * *. In assessing duty on all spun silk or schappe silk yarn, the number indicating the size of the yarn shall be taken according to the metric or French system, and shall, in all cases, refer to the size of the singles. * * *

The yarn in question is valued at over \$1 a pound, is a two-ply yarn, in the gray, and in skeins.

As appears above, the rate of duty upon such an importation depends upon the number indicating the size of the yarn of which it is composed, and this number is to be taken according to the metric or French system and is to refer to the size of the singles.

¹ Reported in T. D. 31954 (21 Treas. Dec., 402).

The yarn in question was described in the invoice as number 200 two ply, which was the number certified by the spinner. But after an examination and report by the appraiser, the collector classified the same as number 210 two ply, and assessed duty upon it accordingly.

The appellee protested against the ruling of the collector and contended that the yarn should be classified as No. 200 two ply, as invoiced. This protest was duly heard upon evidence by the Board of General Appraisers, and the protest was sustained. A rehearing was had upon the application of the Government, with additional evidence, and again the protest was sustained. The Government now prays for a reversal of that decision of the board.

As is above indicated, the contention between the parties relates entirely to the number which should be given the imported yarn according to the metric or French system, as prescribed by the paragraph.

The testimony shows that the method of finding the number of such yarn according to that system is as follows: A measured length of single yarn is reeled off and weighed, and this weight in grams is divided into the length in meters of the piece so weighed; the quotient thus obtained is the number sought. As appears from this statement, the greater the weight of the given piece the less will be the number and the lower the rate of duty under the provisions of the paragraph.

As has been stated, the duty upon such yarn is not assessed according to its weight alone, but also according to its number. This number, however, as has been explained, depends in part upon the weight of the piece of yarn which is selected as the sample for the computation. And the parties reach their point of difference in this case in coming to determine the method of ascertaining the weight of the selected measure of yarn.

The Government contends that the collector in taking the weight of this piece shall find its actual present weight in the condition of moisture in which it may happen to be when the calculation is made. The importer contends that the piece so weighed must first be "conditioned," and that its weight as taken by the conditioning process shall be accepted for the purpose of the calculation. The conditioning process is hereinafter explained. This defines the real issue between the parties in the case, namely, the different methods of ascertaining the weight of the given measure of yarn for the purpose of using it as a factor in the computation required by the metric system.

The testimony shows that the silk yarn in question naturally absorbs considerable moisture from the atmosphere, and the amount so absorbed changes, of course, according to the changing humidity of its surroundings. If the yarn is kept in a dry place it will lose

moisture and weigh less, and if changed to a wet place it will absorb moisture and become heavier. It is said to be the custom to leave it for several days in cellars just before shipping it to this country, so that it may absorb moisture. This reduces the fuzz and makes the yarn smoother and sightlier. At the time of exportation it sometimes carries as much as 13 or 14 per cent of its gross weight in moisture. When fully dried out, it carries a much less percentage of moisture.

In the manufacture of schappe yarn, the spinner sets the draft of his machine so as to turn out a given size of yarn, and a certificate as to the number goes with the invoice of the goods. But such a certificate is often only approximately correct, and may not be accepted by all of the parties dealing with the merchandise. Thereupon the parties may be compelled to ascertain the correct size of the yarn by the metric system, and in order to do so they must first ascertain the weight of a given piece of the yarn as above explained. It is easy to see that in the case of yarn which may absorb 13 or 14 per cent or more of its own weight in moisture in wet surroundings, or retain less than half that much in dry surroundings, an element of considerable uncertainty is thereby introduced into such a calculation.

The testimony shows that this uncertainty was recognized many years ago by the silk trade as a disturbing factor entering into the sale and delivery of such yarns, and efforts were made to correct it. At first the yarn was weighed by hanging it in a room where the temperature and moisture were kept as nearly even as possible. But finally, it is said, the process of "conditioning" the yarn was adopted, first in Turin and afterwards in other places also. By this process a selected piece of the yarn is placed in an oven until all the moisture is expelled from it, then the weight of the dry piece is taken, and to this weight 11 per cent thereof is added as an allowance for normal moisture. The figure thus found is used as the divisor in the calculation above described. At first this fixed allowance was 10 per cent of the dry weight, but afterwards it was advanced to 11 per cent. The witnesses in the case sometimes speak of this allowance as an arbitrary one, but the word is incorrectly used by them in that application, for the figure was not arbitrarily selected, but was the result of general observation and experience and was accepted as a normal element in such a calculation; that is, long-continued observation convinced the trade that 11 per cent was the average percentage of moisture in schappe yarn under ordinary circumstances. And thereupon the trade, not universally but generally, adopted the rule that the yarn should be so conditioned for the purpose of calculating the number or size of the yarn in cases wherein the spinner's certificate was not accepted as final authority. The testimony shows that this rule was approved at a conference of the various silk associations held in Paris

in 1900 and that this approval was received by the trade in general as an authority upon the subject. It is a fair conclusion from the testimony that after that time, if not before, this rule became in a general sense an implied term in contracts for the sale and delivery of schappe yarns unless negatived by some express or implied stipulation in the contract to the contrary. Many conditioning houses were established in Europe, although individual manufacturers often did their own conditioning by means of their own apparatus. Such houses dealt also with other silk products in addition to yarn, and much that has been said above would equally apply to such other products. It appears that at the time of the hearing before the board there was but one such establishment in New York, and that was the United States Silk Conditioning Co., a corporation doing business under the auspices of the Silk Association of America.

The testimony shows that some of the largest dealers in silk goods in Europe refuse to submit their differences to the arbitrament of conditioning houses and demand that their customers accept their certificates as final. But, on the other hand, it appears by a very clear and convincing preponderance of the testimony that the conditioning rule has been generally adopted by the trade, and that it has been so adopted because it was believed to be reasonable, stable, and necessary, and equitable between dealers in such yarns. Where in the assessment of tariff rates the duty depends upon the weight of an article it is the rule that such weight is to be found by taking the article in its condition at importation. Paragraph 404 of the act of 1909 especially applies this rule to silk. But where, as in this case, the purpose of weighing is only to ascertain by calculation the number indicating the size of yarn, and a selected piece of yarn is weighed for the purpose of such a calculation, a different problem presents itself. The weight of the yarn changes with different percentages of moisture in it, but the numbers indicating the size ought not to change according to such percentage of moisture.

The testimony shows such a general trade adoption of and acquiescence in the conditioning rule for finding the number according to the metric system that the reference to this system in paragraph 397 may fairly be held to have had the rule in contemplation.

The yarn in question was conditioned by the United States Silk Conditioning Co., above named, at the instance of the importer, and according to its finding and report the spinner's certificate was sustained and the yarn found to be No. 200 two-ply yarn. There seems to be no dispute about the correctness of this finding upon the basis of the conditioning rule; it is only the rule itself which is disputed by the Government.

In this view of the case, the decision of the board should be
ed.

AMERICAN SMELTING & REFINING CO. v. UNITED STATES (No. 590).¹

BY-PRODUCT OF LEAD BULLION REFINED IN BONDED WAREHOUSE.

Roughly smelted lead bullion, imported and deposited in the bonded smelting warehouse of the importer; later refined, precious metals and a percentage of refined lead being extracted and leaving a by-product of lead, antimony, and other substances; this by-product is not to be deemed bullion, but type metal, and when this is withdrawn from the bonded warehouse for domestic consumption it is dutiable under paragraph 191, tariff act of 1909.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers G. A. 7148 (T. D. 31201).

[Reversed.]

Brown & Gerry (James L. Gerry of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Certain lead bullion was imported at the port of Perth Amboy, N. J., and was subsequently smelted and refined under bond. A lead product resulting from the smelting and refining was withdrawn for domestic consumption and was assessed for duty by the collector of customs as lead bullion at 2½ cents per pound under the provisions of paragraph 182, and as provided in section 24 of the tariff act of August 5, 1909, the material parts of which paragraph and section are as follows:

182. Lead dross, lead bullion or base bullion, lead in pigs and bars, lead in any form not specially provided for in this section, old refuse lead run into blocks and bars, and old scrap lead fit only to be remanufactured; all the foregoing, two and one-eighth cents per pound; * * *.

Sec. 24. That the works of manufacturers engaged in smelting or refining, or both, of ores and crude metals, may upon the giving of satisfactory bonds be designated as bonded smelting warehouses. Ores or crude metals may be removed from the vessel or other vehicle in which imported, or from a bonded warehouse, into a bonded smelting warehouse without the payment of duties thereon and there smelted or refined, or both, together with other ores or crude metals of home or foreign production: *Provided*, That the several charges against such bonds may be canceled upon the exportation or delivery to a bonded manufacturing warehouse, established under section twenty-three of this act, of the actual amount of lead produced from the smelting or refining, or both, of such ores or crude metals: *And provided further*, That said lead may be withdrawn for domestic consumption or transferred to a bonded customs warehouse and withdrawn therefrom upon the payment of the duties chargeable against it in that condition: *Provided further*, That all labor performed and services rendered pursuant to this section shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer: *Provided further*, That all regulations for the carrying out of this section shall be prescribed by the Secretary of the Treasury.

The American Smelting & Refining Co., which imported and refined the lead bullion, protested that the product resulting from the refining of said bullion was not lead bullion but type metal, and that therefore, in accordance with the provisions of section 24, it was dutiable at 1½ cents per pound on the lead contained therein, as provided by paragraph 191, which reads as follows:

191. Type metal, one and one-half cents per pound on the lead contained therein; new types twenty-five per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed.

From the report of the collector of customs, the testimony in the case, and the findings of the board, it appears that the importation was one of crude metal in the form of lead bullion, which had been roughly smelted at Monterey, Mexico, and shipped from Tampico, Mexico, to the United States. On arrival at destination the lead bullion was removed to the bonded smelting warehouse of the importers without the payment of duties and there subjected to a refining process which, as found by the board, extracted therefrom the precious metals and a percentage of refined lead, leaving a residuum or by-product, of which, on the average, 81 per cent was lead, 17 per cent antimony, and 2 per cent other substances, such as arsenic, copper, and silver. This residuum or by-product was withdrawn for domestic consumption, and is the article which the collector classified as antimonial lead dutiable at 2½ cents per pound under paragraph 182, by reason of the provisions of section 24, and which the board decided was dutiable as lead bullion at the same rate under the same paragraph and section. On this state of facts there is but one question presented by this appeal, and that is, What construction should be put upon section 24, and particularly upon that part of it dealing with lead withdrawn for domestic consumption? That section provides in effect:

First. That *manufacturers* engaged in the smelting or refining of ores and crude metals may secure the designation of their works as bonded smelting warehouses by giving satisfactory bonds.

Second. That imported ores and crude metals may be transferred to such bonded smelting warehouses without the payment of duties and there smelted or refined, or both, together with other ores or crude metals of home or foreign production.

Third. That the several charges against such bonds may be canceled upon the exportation or delivery to a bonded manufacturing warehouse established under section 23 of the act of the actual amount of lead produced from the smelting or refining, or both, of such ores or crude metals.

Fourth. That said lead may be withdrawn for domestic consumption upon payment of the duties chargeable against it *in that condition*.

It seems to us that these provisions indicate with a fair degree of clearness that lead produced in bonded smelting warehouses by the smelting or refining of imported ores or crude metals may be withdrawn for domestic consumption upon the payment of the duties chargeable against it in its smelted or refined condition. Instead of making the withdrawal of such lead dependent upon the payment of the duties which attached to it in its imported condition Congress explicitly provided that it might be withdrawn on the payment of the duties chargeable against it "in that condition," that is to say, the condition in which it was found after smelting or refining or both. Now, what was the smelted or refined condition of the lead product withdrawn for domestic consumption? Was it a lead bullion or a base bullion? We think not—certainly not if bullion is to receive its definite and recognized meaning. The term "bullion" means a mixture of metals of which gold or silver or both are constituent parts, and if used without qualifying words signifies in this country a mixture of gold and silver in the form of bars, plates, or ingots. Base bullion is a combination of a base metal with gold or silver or both. Lead bullion is a base bullion and is made up of the base metal lead and gold or silver or both. (Standard Dictionary; Century Dictionary; Notes on Tariff Revision, par. 182.) The board found that the smelting of the lead bullion imported resulted in the extraction from it of the gold and silver which it contained. What was left after smelting, namely, the product under discussion, could not therefore have contained gold or silver, certainly not in an appreciable amount, otherwise mention of one or both of these precious metals would have been made in the report of the official analysis. Consequently it would seem that the product withdrawn for domestic consumption was not a bullion, and that the finding of the board that it was dutiable as lead bullion or base bullion was not warranted by its status at the time of withdrawal, when duties became chargeable against it, not in its imported but in its smelted condition.

According to the chemical analysis the article assessed for duty contains on the average 81 per cent of lead and 17 per cent of antimony, thus accounting for 98 per cent of the component materials, and leaving 2 per cent unaccounted for, which, in all probability, consists of negligible quantities of other metals, such as arsenic, copper, and silver. Such a mixture of lead and antimony, even if it contain a small percentage of arsenic, copper, and silver, is, according to the uncontradicted testimony, a type metal. It falls within the definition of type metal as announced by the board in T. D. 28511, it is the article which since 1907 has been admitted by the custom-house as type metal, it was bought and sold in this case as type metal, it is admitted by the Government to be type metal, and in our opin-

ion it is a type metal. Type metal is lead in a form specially provided for in paragraph 191, and we think therefore that the product in controversy is, by virtue of the second proviso to section 24, subject to the duty prescribed by that paragraph. Section 23 provides that by-products incident to the processes of manufacture in bonded manufacturing warehouses may be withdrawn for domestic consumption upon the payment of a duty equal to the duty which would be assessed and collected by law if such by-products were imported from a foreign country. It seems to us that the second proviso of section 24 had a similar purpose in view, and that it was designed and intended by Congress to put lead products resulting from the smelting or refining of ores or crude metals in bonded smelting warehouses in the same position with respect to duty as by-products of bonded manufacturing warehouses and in no worse position than imported materials of the same kind. Certainly it would be anomalous that the by-product of a bonded smelting warehouse should be made dutiable on a basis different from that fixed for the by-products of bonded manufacturing warehouses.

The decision of the Board of General Appraisers is *reversed*.

HAMBURGER *v.* UNITED STATES (No. 625).¹

CELLULOID IMITATION FLOWERS—ROSE PINS.

The certainty required in a commercial designation is not here shown, and it appearing that the small imitation flowers of the importation are made of celluloid and attached to metal pins, designed to be worn as boutonnieres, and that they are so worn by adults, they can not be taken to be "toys"; they were dutiable as artificial flowers under paragraph 425, tariff act of 1897.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from United States Circuit Court for Southern District of New York,
Abstract 18920 (T. D. 28998).

[Affirmed.]

Brown & Gerry for appellant.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of certain flower pins imported at the port of New York. These articles are small imitation flowers made of celluloid, attached to metal pins, and are designed and intended to be worn as boutonnieres. The collector of customs classified the merchandise as "artificial flowers" and assessed them for duty at 50

¹ Reported in T. D. 31956 (21 Treas. Dec., 409).

per cent ad valorem under the provisions of paragraph 425 of the tariff act of July 24, 1897, which paragraph reads, in part, as follows:

425. * * * artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem.

The importers protested that the goods were "toys," and claimed that as such they were dutiable at 35 per cent ad valorem under the provisions of paragraph 418, which reads as follows:

418. Dolls, doll heads, toy marbles of whatever materials composed, and all other toys not composed of rubber, china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this act, thirty-five per centum ad valorem.

The Board of General Appraisers overruled the protest, and the importers appealed to the United States Circuit Court for the Southern District of New York, which affirmed the decision of the board. From the judgment of the Circuit Court the importers again appealed to the United States Circuit Court of Appeals, and that appeal having been transferred by the act of August 5, 1909, to this court, is now submitted to it for determination.

On the hearing before the board the importers contended and sought to prove that the goods in question were toys in fact and that at and prior to the passage of the tariff act of July 24, 1897, they were generally, definitely, and uniformly known to the trade of the country as "toys." We think that neither contention was established by satisfactory evidence. Testimony to the effect that the flower pins were worn by children on festive occasions; that they were used as gifts in prize packages purchased by children; and that they were bought and sold by toy dealers and dealers in notions fell short of showing that the articles were toys—that is to say, playthings, things intended and designed for the amusement of children only, and which by their very nature and character were reasonably fitted for no other purpose. An examination of the samples in evidence discloses that the flower pins in question are neither more nor less than boutonnières of artificial flowers, and it affirmatively appearing from the record that they can be and are worn by adults as boutonnières it can hardly be said that they are designed and intended for the amusement of children only and are reasonably fitted for no other purpose. In the case of *United States v. Cattus* (167 Fed. Rep., 532) it was decided that artificial shamrocks worn by men, women, and children of the Irish race on St. Patrick's Day were not toys, and as artificial boutonnières or "flower pins" do not materially differ from artificial shamrocks we think the reasoning which excluded the latter must exclude the former from the category of toys.

The testimony as to commercial designation was weak and unsatisfactory, and the conclusion of the importers' witnesses that "flower pins" were recognized by the trade generally and uniformly as toys

seems to have been based largely upon the fact that they were used by children for amusement; that they served the purpose of gifts in prize packages sold to children; and that they were handled by dealers in toys and notions. None of the witnesses would say that the imported articles were bought and sold by the trade as toys, and one of them declined to say that they were "a trade and commerce toy." In view of this state of the evidence and of the fact that in previous controversies concerning the dutiability of imitation flowers made of celluloid and attached to metallic pins merchants did not always claim them to be toys (T. D. 14706; T. D. 14938), we do not feel warranted in holding that the importers have proven a commercial designation of the goods with that positiveness, definiteness, and certainty which the decisions seem to require.

The judgment of the Circuit Court is *affirmed*.

UNITED STATES *v.* MASON BROS. & Co. (No. 726).¹

ARTICLES COMPOSED OF TISSUE PAPER.

The proviso to paragraph 410, tariff act of 1909, covers all articles composed of tissue paper, and by providing that such articles shall pay no less rate of duty than that imposed upon the component paper of chief value of which any such article is made, the classification of tissue-paper fans was fixed as proper under that paragraph.—*Downing v. United States* (141 Fed. Rep. 490; T. D. 26454) distinguished.

United States Court of Customs Appeals, October 12, 1911.

APPEAL from Board of United States General Appraisers, Abstract 26241 (T. D. 31804).

[Reversed.]

William L. Wemple, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

No appearance for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise entered consisted of fans made of tissue paper, and was assessed for duty under paragraph 410 of the tariff act of 1909 as articles composed wholly or in chief value of paper.

Relevant portions of paragraph 410 read as follows:

Papers commonly known as * * * tissue paper, * * * five cents per pound and fifteen per centum ad valorem * * *: *Provided*, That no article composed wholly or in chief value of one or more of the papers specified in this paragraph shall pay a less rate of duty than that imposed upon the component paper of chief value of which such article is made.

The importer contended and the Board of General Appraisers held that the fans in question were dutiable as manufactures of paper not specially provided for. This holding was based upon the decision of the court in *Downing v. United States* (141 Fed. Rep., 490; T. D.

¹ Reported in T. D. 31957 (21 Treas. Dec., 411).

An examination of the act of 1897, which was construed in *Downing v. United States*, discloses that while tissue paper was made dutiable by paragraph 397, there was no provision covering articles composed of tissue paper. That case is therefore no authority to sustain the holding of the board in the present case.

This distinction was evidently overlooked, as it seems perfectly clear that the proviso in question covers all articles composed of tissue paper, and in providing that such articles shall pay no less rate of duty than that imposed upon the component paper of chief value of which such article is made, the language of the act itself fixes the classification for the present importation.

The decision of the Board of General Appraisers is reversed, and the assessment is *affirmed*.

AMERICAN TRADING CO. v. UNITED STATES (No. 99).¹

1. HANDMADE PRINTING PAPER SUITABLE FOR BOOKS.

The term "handmade" as applied to paper is precise, explicit, specific, and controlling, and since the handmade paper of the importation weighed 10 pounds to the ream, it was dutiable under paragraph 401, tariff act of 1897.—*Benneche & Bro. v. United States* (153 Fed. Rep., 861).

2. EFFECT OF DEPARTMENTAL PRACTICE.

Even if the evidence showed, as it does not, that the practice of the Treasury Department had been contrary to the ruling now made, the reason for invoking departmental practice as binding is not found here; the provisions of the statute under consideration are not of doubtful construction.

United States Court of Customs Appeals, October 16, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 20115 (T. D. 29429).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellant.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved in this case is concededly handmade paper weighing over 10 pounds to the ream. The appellant claims and the board found that it is also printing paper suitable for books. This is not denied by the United States.

The sole question is whether this paper is dutiable under paragraph 396 or under paragraph 401 of the tariff act of July 24, 1897. We insert here the material part of each paragraph.

396. Printing paper, unsized, sized or glued, suitable for books and newspapers,
* * *

401. Writing, letter, note, hand-made, drawing, ledger, bond, record, tablet, and typewriter paper, weighing not less than ten pounds and not more than fifteen pounds to the ream, * * * but if any such paper is ruled, bordered, embossed, printed, or decorated in any manner, it shall pay ten per centum ad valorem in addition
* * *.

¹ Reported in T. D. 31972 (21 Treas. Dec., 433).

The collector and the Board of General Appraisers agreed that this paper was dutiable under paragraph 401.

It is clear that being printing paper suitable for books it is included within the provisions of paragraph 396, and also being handmade paper it is equally clear that it is within the provisions of paragraph 401. Under these circumstances, to use the language of the Supreme Court in *Fink v. United States* (170 U. S., 584)—

The question is, which, if either of the two (paragraphs), is so dominant in its control of the article in question as to exclude the operation of the other. The rule is that this, if possible, is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than the other.

The term "handmade" as applying to paper first appeared in the tariff act of 1897.

It is obvious, having regard to method of production, that all papers will fall within one of two classifications, namely, machine made or handmade, unless possibly it may be said that some papers are partially machine and partially hand made, but this question is not involved here, and it would seem that the handmade article must constitute but a small part of the entire paper product.

Congress is presumed to have had in mind that paper was divisible into these two classes and to have used the term "handmade" as applicable to all kinds of paper made by hand, unless when referring thereto some words of limitation, extension, or exclusion were also used in the same connection.

The term "handmade" as applied to paper is, we think, precise, explicit, specific, and controlling in this case. The word is used without any modifying language, except as to the weight per ream, and nothing else is found in the paragraph to suggest that any kind or class of handmade paper shall be exempted from its provisions.

Indeed, as was said by the Circuit Court of Appeals in *Benneche & Bro. v United States* (153 Fed. Rep., 861), Congress had in mind that the handmade paper might be suitable for printing or might be printed upon, because the same paragraph provides that if any such paper is printed in any manner it shall pay an additional rate of duty. But independent of this, we are clear that the words "handmade paper" more specifically describe the importation in question than does the term "printing paper, unsized, sized, or glued, suitable for books and newspapers" in paragraph 396. It is a specific designation from the standpoint of original manufacture.

No question of commercial designation is made in the case here. The paper is "handmade," that is, made by hand, and the record shows that it is made from a vegetable fiber obtained from the bark of certain trees in Japan. Whatever may be its uses, we think Congress intended, if it was of the weight described in paragraph 401, that it should pay the duty therein made chargeable upon paper made by hand.

While this conclusion seems to be the only natural one to be reached on a reading of the two paragraphs in question, it is also supported

by authority. *United States v. Davies, Turner & Co.* (177 Fed. Rep., 371); *Benneche & Bro. v. United States* (153 Fed. Rep., 861); *United States v. Seyd* (158 Fed. Rep., 408).

We are not unmindful of the case of *Miller, Sloane & Wright v. United States* (128 Fed. Rep., 469), and the same case in 135 Federal Reporter, 349, which are some authority for the appellant's contention here. We think, however, that notwithstanding these cases the later ones to which we have first above referred have so far impaired their effect that if we felt bound to regard either as a precedent we should follow those first above cited. Independent of the authority, however, of any of these cases our conclusion is that the construction we have above indicated is the one which should be adopted in this case.

With reference to the appellant's claim as to the effect of the departmental practice in the construction of these paragraphs, as relates to handmade paper, it is sufficient to say, first, that no reason applies for its application here because we do not find the provisions of the statute under consideration of doubtful construction, and also because the facts in the case here show that there has been no such uniform, long continued, and uninterrupted construction of the statute favorable to the appellant's claim as would render it effective here.

The result is that the judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES v. FRANK & LAMBERT (No. 115).¹

PRO FORMA INVOICE INDORSED "APPROVED" BY APPRAISER.

The importers entered the goods upon affidavit and statement in the form of an invoice, giving bond as required by law. The collector sent this pro forma invoice to the appraiser, and upon the report of the assistant appraiser there appeared the words "Approved, E. S. Fowler, appraiser." Later the importers filed a consular invoice to cancel their bond, and in an accompanying verified statement asserted the incorrectness of the pro forma invoice, but made no application for reappraisal. The entry was liquidated on the basis of the value as given in the pro forma invoice. *Held*, the indorsement of "approved" by the appraiser shows a compliance with the requirement that he should ascertain, estimate, and appraise the actual market value of the merchandise and make a report thereon; furthermore, to hold thus is in accord with the regulations and practice in respect of pro forma invoices.—*United States v. Bennett & Loewenthal, infra* (T. D. 31975).

United States Court of Customs Appeals, October 16, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21027 (T. D. 29690).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Curie, Smith & Maxwell (*Thomas M. Lane* of counsel) for appellees.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

HUNT, Judge, delivered the opinion of the court:

The United States appeals from a decision of the Board of General Appraisers sustaining the protest of the importers, appellees, against

¹ Reported in T. D. 31973 (21 Treas. Dec., 436).

the assessment of duties by the collector of customs at New York on the value stated in a pro forma invoice made in 1907 and covering certain cotton goods. It appears that Frank & Lambert, the importers, having no consular invoice at the time of entry, made entry upon affidavit and statement in the form of an invoice, as permitted by section 4 of the customs administrative act of 1890, and gave bond in the penal sum of \$300, as required by said section. In the statement and affidavit, which is called a pro forma invoice, the importers stated the price of the cotton as follows: 1,978 yards at 4½d., 389 yards at 7d. On October 23, 1907, the collector sent the pro forma invoice to the appraiser. Upon the report of the assistant appraiser there appear the words "Approved, E. S. Fowler, appraiser." On January 25, 1908, the importers filed a consular invoice to cancel their bond, accompanying the invoice with an application, submitting that their bond was entitled to cancellation upon the ground that the pro forma invoice used on entry was made out erroneously by the shipping clerk in London, the pro forma invoice prices of 1,978 yards at 4½d. and 389 yards at 7d. being erroneous in that the correct prices as ordered were 1,978 yards at 4½d. and 389 yards at 6½d. The application, which was verified, contained the statement by the importers that they were confident that the appraiser, if requested, would report the consular prices to be correct. The collector appears to have taken no action upon this verified letter or application, but on February 10, 1908, liquidated the entry upon the basis of the pro forma invoice value.

The importers made no application for a reappraisement, but on February 20, 1908, filed a protest based upon the ground that the prices stated in the pro forma invoice were inaccurate through clerical error. The Board of General Appraisers sustained the protest for the reason that the value as entered on the pro forma invoice having been marked "Approved" by the appraiser did not indicate any regular appraisement of the merchandise, and upon the further ground that inasmuch as the consular invoice, which stated a lower value, was furnished to the collector prior to the liquidation of the entry, it was the duty of the collector to reliquidate the entry on the basis of the values as stated in the consular invoice.

The case is now before us upon the principal contention that the board erred because duty was properly assessed upon the value as stated in the pro forma invoice, and that the appraiser's return made on the pro forma invoice was the appraisement of the merchandise, and became final and conclusive against the importers, under section 13 of the act of June 10, 1890.

The pertinent provisions of the act of June 10, 1890, are as follows:

SEC. 4. That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding one hundred dollars in dutiable value shall be admitted to entry without the production of a duly-certified invoice thereof

as required by law, or of an affidavit made by the owner, importer, or consignee, before the collector or his deputy, showing why it is impracticable to produce such invoice; and no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of such merchandise, if purchased, or if obtained otherwise than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; which statement shall be verified by the oath of the owner, importer, consignee, or agent desiring to make entry of the merchandise, to be administered by the collector or his deputy, and it shall be lawful for the collector or his deputy to examine the deponent under oath touching the sources of his knowledge, information, or belief in the premises, and to require him to produce any letter, paper, or statement of account, in his possession, or under his control, which may assist the officers of customs in ascertaining the actual value of the importation or any part thereof; and in default of such production when so requested, such owner, importer, consignee, or agent shall be thereafter debarred from producing any such letter, paper, or statement for the purpose of avoiding any additional duty, penalty, or forfeiture incurred under this act, unless he shall show to the satisfaction of the court or the officers of the customs, as the case may be, that it was not in his power to produce the same when so demanded; and no merchandise shall be admitted to entry under the provisions of this section unless the collector shall be satisfied that the failure to produce a duly certified invoice is due to causes beyond the control of the owner, consignee, or agent thereof. * * * And when entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice the collector shall require a bond for the production of a duly certified invoice.

SEC. 5. That whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port, at the time of entry by the owner, importer, consignee, or agent; which declaration so filed shall be duly signed by the owner, importer, consignee, or agent, * * *.

SEC. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; * * * *And provided further*, That all additional duties, penalties or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice. * * * The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

SEC. 10. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

SEC. 13. That the appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser, * * * shall report to the

collector his decision as to the value of the merchandise appraised. * * * If * * * the importer, * * * shall be dissatisfied with the appraisement * * *, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may, within two days thereafter give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall at once direct a reappraisement of such merchandise by one of the general appraisers. The decision of the appraiser * * * (in cases where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), * * * shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, * * *.

Certain matters become relevant and must be accepted as essentials in the administration of the customs laws. It is plain that under the provisions of the customs administrative act the appraiser is required to "ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value" of the merchandise, and thereafter to "report to the collector his decision as to the value of the merchandise appraised." (Secs. 10 and 13 of said act.) It is equally clear that the duty of the appraiser is to make careful examination and to appraise the goods at the actual market value and to indorse these facts upon the invoice and to sign the same. (Art. 1246, Customs Regulations of 1899.) Proceeding, therefore, upon the assumption that compliance with these requirements is indispensable to a valid appraisement, we advance at once to the inquiry whether the record in the present case shows affirmatively that such necessary steps were taken or whether, in the absence of such a showing, there is yet a record which is so far aided by legal presumptions which attend it as to compel the conclusion that there was a valid appraisement and a sufficient report thereof. It is well to bear in mind that we are not called upon to consider a case of omission of any action by the appraiser or collector, for it is conceded the pro forma invoice was before such officials, and that they did act thereon to an extent, the former by stamping the word "approved," together with his name, upon the invoice, and by thereafter returning such stamped invoice to the collector; the latter by liquidating the entry.

Now, the purpose of the statutes which allow an importer to make a pro forma invoice is undoubtedly to enable him to obtain immediate possession of his merchandise. Obviously, this right to such possession is often of vital commercial importance to an importer; hence it would seem that in order to maintain the full enjoyment of the right, the policy of the statute being in aid of facility of importation entry, should be sustained by liberal rather than narrow construction. But on the other hand, official action by a customs officer is presumed to be regularly and lawfully had; and the force of this presumption is not to be passed over lightly, but to be regarded as always present and necessary to be considered when the acts of

customs officials are assailed. As was said by Justice Hunt in *Arthur v. Unkart* (96 U. S., 118):

* * * These officers are, however, selected by law for the express purpose of deciding these questions; they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. This rule is not only wise and prudent, but is in accordance with the general principle of law that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given to him, is presumed to have acted rightly.

As the corollary of this doctrine, one who would set aside the acts of such officials must assume the burden of proving that in fact or law error has been committed.

The importers say that the word "approved" appearing upon the invoice over the name of the appraiser means nothing, and that "no appraisement, or at least no legally reported appraisement, was made of the merchandise in this case." Offering no testimony other than the papers themselves, they assume the position that there is no presumption of legal action by the appraiser "because he has not acted at all or at least has not registered his action so that the presumption can attach." Looking into this position, we find that it contains two propositions—one, that there never was action; another, that there was action, but that there is no competent evidence thereof, and that therefore the case is to be regarded as if there were no action at all. The statement of these elements demonstrates that they are separate, and lest confusion of them be had, it is well to refer briefly to each.

An appraisement is the act of determining the value, while the report of the appraisement is the written evidence of the performance of such determination. The methods of actually making the appraisement, the means to be used by the appraiser in ascertaining, estimating, and arriving at actual market values, must be employed antecedent to the report. They are the predicates for the report. An appraiser may have samples before him; he may have the report of the deputy appraiser; he may himself have extensive knowledge of the merchandise under consideration; and he may apply all or any of these qualifications in the processes of thought by which he forms his conclusion. Yet none are matters which need be written down, and indeed they could not well be recorded, when we consider the imperative need for that expedition which must prevail in custom-house administration. The appraiser is merely called upon to write the ultimate facts found, namely, the actual market values of the merchandise imported. It would seem to follow as a consequence of these views that, in the absence of an express requirement that the appraiser shall write out such preliminary findings or facts or reasons for his ultimate facts, when he has written down the values he has completed his appraisement, and at once the law surrounds his act by the presumption that every essential antecedent step has been taken.

And as the importers have made no showing of fraud, or that the action of the officials was upon a fundamentally erroneous principle, the case is one for the application of the rule laid down by us in *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217), in that the record, together with the presumptions in favor of the appraisement, are proofs which sustain the action had, provided the appraiser made a report to the collector of his decision as to the value of the merchandise appraised.

Thus we are brought to the second element of the proposition, the point that there was no legal report of appraisement. The pro forma invoice, upon which the word "approved" appeared was for all purposes of entry the invoice. It became the statement upon which the importers made their case and availed themselves of the right to obtain possession of their goods. The statements therein were sworn to and became binding upon those who made them, subject always to the provisions of law as provided for in sections 4 and 7 of the law already cited. But we need not consider the qualifying provisions at this time, because they do not affect the language which makes it the duty of the appraiser to proceed upon the pro forma invoice, and to revise and correct the report of the assistant appraiser as he judges proper, and then to make his decision and to report to the collector the value as decided. The form of the report of the decision as to value is not prescribed by law, and while it might be well, from an administrative point of view, to have a uniformity of words in the expression of the action of the appraiser and for his report, still, if the record shows that action has been had and what it was, such record should be deemed a sufficient report to the collector, even though the language is not as full as might be. We think, too, in the absence of evidence tending to show some omission to do what the law required the appraiser to do, that the word "approved," appearing upon the report of the assistant appraiser over the signature of the appraiser, is, in effect, a statement that the appraiser has adopted as his own the acts and findings of the assistant appraiser and that he has made them his ascertainment, estimate, and appraisement of actual market value of the merchandise. So here, the appraiser having made his decision, the paper with the writing became an account of the transaction, which, when transmitted, became a valid report to the collector.

If the importers had requested reappraisement, further inquiry might be necessary, but in the absence of an application for such relief the facts make the case one where the decision of the appraiser is final and not subject to review.

Appellees urge that the pro forma invoice was erroneously made out by the shipping clerk in London and that therefore the duty of the collector was to withhold such pro forma invoice from appraise-

ment. We readily assent to the view that where a mere clerical error has been made and seasonable effort to correct such error is had every consideration of justice between the importer and the Government calls for rectification. But the record contains no evidence of such a mistake, unless it is to be inferred from the statement contained in the letter of the importers, dated January 25, 1908, addressed to the collector. It may be granted that the letter asserts that the importers made a slight error of fact in the statement of the value of their goods when they entered them upon pro forma invoice. They valued their goods at a little more than they cost. But the statement of value was apparently made with care and fails to show either manifest clerical error or such mistake as appeals for remedy within the spirit or letter of section 24 of the act of June 10, 1890, which authorizes correction of "manifest clerical errors in any entry or liquidation for or against the United States at any time within one year of the date of such entry, but not afterwards." The importers cite the case of *United States v. Muller, Maclean & Co.* (158 Fed. Rep., 405), but that was one where undisputed evidence showed that a rupee mark was mistaken for a dollar mark, and the court very naturally held that such a pure mistake authorized correction. The case well illustrates what is meant by manifest clerical error.

United States v. Muller, Maclean & Co. (152 Fed. Rep., 575), affirmed in 158 Federal Reporter, 405, was a case where testimony was heard and it was made to appear that the appraising officer did not perform the duty imposed upon him by law, and because of such total failure the court held that there was no appraisement and that the importer was entitled to relief by the appraisement of duty upon the consular invoice rather than upon the pro forma invoice.

Another aspect of the case should be mentioned. Examination of the practice that has prevailed in the administration of customs laws shows that pro forma invoices have for years constituted the bases upon which the appraisement of merchandise has been had. The act of March 1, 1823, provided for entry by appraisement in the absence of an invoice; so did the act of March 3, 1863, section 2858, Revised Statutes United States. The act of June 22, 1874, sections 9, 10, and 11 (18 Stat., 188), made specific provision for entry on pro forma invoices. Frequent construction of the act of 1874, just referred to, as well as of the authority conferred in preceding acts, leads us to hold that the better rule is that where imports have been entered by appraisement in the absence of an invoice and the value of the invoice afterwards produced is less than that found by the appraisers on the entry, no allowance by return of duty can be made for the difference, but if the invoice shows a

greater value than that ascertained by the appraisement, the United States will be entitled to duties on such excess of value. (See regulations of 1857, art. 360, and 1874, art. 341.) Thus, it was provided by the regulations of 1884, article 329, that—

Where imports have been entered on affidavit and statement, in the absence of an invoice, and the value in the invoice afterwards produced is less than that found by the appraisers on the entry, no allowance by return of duties can be made for the difference. But if the invoice shows a value greater than that ascertained by the appraisement the United States will be entitled to duties on such excess of value. (R. S., 2900.)

We find, too, that the regulations of 1892, article 285; 1899, article 394; and 1908, article 182, provided as follows:

When the certified invoice is received, it must be compared with the entry, and any duty remaining due must be collected. The provisions of the law regarding penalties for undervaluation are alike applicable to pro forma invoices, but no refund of duty shall be made because a certified invoice exhibits a lower value than that shown by the pro forma invoice.

These rulings and regulations show that the conclusions which we have reached are in harmony with the practice which has long been applied to cases where the value given in the pro forma invoice has been somewhat higher than that included in the consular invoice subsequently received.

It is true that the opinion of the Board of General Appraisers, adopted by the Circuit Court in *United States v. Commercial Cable Co.* (141 Fed. Rep., 473), was to the effect that an entry made on a pro forma invoice remains open until the conditions of the bond for the production of the consular invoice have been fulfilled or the bond forfeited, and that when the consular invoice is duly produced and approved by the appraiser the entry should be liquidated on the basis of the consular and not the pro forma invoice. But we are constrained to hold that where, as here, the certified invoice is produced after appraisement, and where, as here, no reappraisement was sought or had, the general language of the opinion referred to is not in accord with the true interpretation of the statute. *United States v. Merck* (91 Fed. Rep., 641). A fuller expression of the views of this court upon this point will be found in the case of *United States v. Bennett & Lowenthal*, just decided. (2 Ct. Cust. Appls., 249; T. D. 31975.)

We rest our opinion in the present case upon the ground that the learned Board of General Appraisers confined the effect of the word approved, which appeared upon the invoice, within too narrow a scope, and that they erred in failing to regard it as applicable to all steps which the law required the appraiser to take in making his appraisement, as well as in making the report thereof. And inasmuch as the importers have failed to sustain any of their contentions, the decision of the Board of General Appraisers must be *reversed*.

PRITCHARD & Co. v. UNITED STATES (No. 417).¹

1. KRAFT PAPER NOT PRINTING PAPER.

The Board of General Appraisers having found the consignment to be wrapping paper and not printing paper, and an examination of the evidence of record failing to show this decision to have been wholly unsupported or contrary to the weight of the evidence, the decision will be affirmed.

2. COMMERCIAL DESIGNATION.

Where there is a question of an article being dutiable and the rate of duty depends on that article's suitability for a given use, its commercial designation is a material fact.

United States Court of Customs Appeals, October 16, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23582 (T. D. 30793).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, HUNT, SMITH, BARBER, and DE VRIES, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise in this case is a brown paper, known as kraft paper, chiefly manufactured in Norway and Sweden, and the question is whether it is dutiable under paragraph 396 or paragraph 402 of the tariff act of July 24, 1897. The material parts of these respective paragraphs are as follows:

396. Printing paper, unsized, sized or glued, suitable for books and newspapers
* * * valued above five cents per pound, fifteen per centum ad valorem.

402. * * * All other paper not specially provided for in this act, twenty-five per centum ad valorem.

The Board of General Appraisers sustained the action of the collector, assessing the paper under paragraph 402.

It is conceded by the importers that the general use of this kraft paper is as a wrapping paper for which its strength makes it especially adaptable and useful. There is no claim that the paper is suitable for printing newspapers.

Before considering the claims of either party, the opinion of the Board of General Appraisers will be examined for the purpose of ascertaining just what was decided there as affecting the issues here. The board distinctly found that the paper in question is not printing paper, and in effect held as a matter of law that Congress intended that the term "printing paper" as used in paragraph 396 "should apply only to such as was *recognized* as printing paper." By this we take it the board considered the term "printing paper" as used in the paragraph to refer only to such as was commercially known as

¹ Reported in T. D. 31974 (21 Treas. Dec., 443).

printing paper, or in the event no question of commercial designation was raised, to what was commonly known as printing paper. The board further found that the paper in question is commonly known and used as a wrapping paper, that it is also at times used for printing books and for covers of books—that is, the outside paper covers of books.

It will be observed that paragraph 396 does not apply to *paper suitable for books*, but does relate to *printing paper suitable for books*. We do not treat the condition of “unsized, sized or glued” mentioned in the paragraph as of any consequence, because no claim with reference thereto is made, but it is assumed the paper possesses those characteristics

It is obvious, therefore, that at the threshold of this case it is necessary for the importers to establish, as required by the applicable rules of evidence, the fact that the paper is “printing paper.” Upon this issue they seem to have failed so far as the Board of General Appraisers is concerned, and applying the familiar rule that the finding of the board will not be reversed unless it is wholly without evidence to support it or clearly contrary to the weight of evidence, it follows that the finding in this case must stand unless, considered in the light of that rule, error be found therein. We have carefully examined the evidence, which is conflicting, upon this question and are unable to say that the board has erred in its finding upon this issue.

But there is one other view of the case which is presented by the importers and merits consideration. It is claimed in substance that the board has misinterpreted the application of the term “printing paper” in that it has limited the same to such papers as are recognized as printing papers; in other words, to paper commercially known as printing paper, and it is said that the rule of commercial designation has no application to such words in the paragraph because the language therein is descriptive and not denominative and that where the dutiability of an article depends upon its suitability for a use the question of commercial designation is inapplicable and immaterial.

We are unable to agree with the contention of appellants that when merchandise is referred to by descriptive terms it may not, if it can, be shown that those terms have a commercial meaning.

In *Arthur v. Cumming et al.* (91 U. S., 362) the court said:

The rule to be followed in the construction of revenue statutes in cases like this is well settled in this court. It is, that the descriptive terms applied to articles of commerce shall be understood according to the acceptance given to them by commercial men in our own ports at the time of the passage of the act in which they are found.

This is only one of the many cases that may be cited in support of the rule, and the distinction as to its application claimed by appellants seems to be without foundation.

Indeed, it would seem that this case is one peculiarly adapted for the application of the rule that the language used in describing the commodity was used in its commercial sense. The words themselves signify some particular kind of paper and in addition it must be suitable for books.

The question of whether it is printing paper or not may well be determined by the understanding of the trade in relation to paper, but whether or not it is suitable for books still remains a question of fact probably not dependent upon any trade understanding.

We think, therefore, that the board committed no error in finding that the importation was not printing paper. This conclusion makes it unnecessary to further discuss the points raised by appellants' counsel. The result is that the judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* BENNETT & LOEWENTHAL (No. 455).¹

The entry was made on a pro forma invoice, on or about April 25, 1907. On May 2 the importers filed a consular invoice duly certified, showing the consignment cost less than the amount stated in the pro forma invoice. On May 9 the assistant appraiser made a return on the pro forma invoice showing it to be correct, and apparently on the same day the appraiser's approval was indorsed thereon. The collector's notation on the pro forma invoice showed the entered value to be the same as that approved by the appraiser. Later, on May 13, at the request of the appraiser the pro forma invoice was returned to him, and on the next day it was sent to the collector by the assistant appraiser with a notation correcting by diminishing the stated value of the consignment, but no approval of this act by the appraiser is shown, and the collector thereupon indorsed "No reduction in entered value allowed." The importers took no appeal.

1. DUTY OF AN APPRAISER.

An appraiser, after having once performed the duty of appraisement in respect of any particular merchandise and after having made his return thereof to the collector, has no authority of his own volition to make another appraisement of the same merchandise.—United States *v.* Frank & Lambert (2 Ct. Cust. Appls., 239; T. D. 31973).

2. PROCEEDINGS ON A PRO FORMA ENTRY NOT SIMPLY TENTATIVE.

Reviewing at length the history of the legislation, the practice of the Treasury Department and the decisions of the courts as well, no warrant is found for the statement that an entry upon a pro forma invoice should be held open until the certified invoice is produced or the bond given for its production has been forfeited; nor is any authority found for holding that liquidation is proper on an amount less than the entered value in case an entry is made upon a pro forma invoice, no manifest clerical error or duress appearing.

¹ Reported in T. D. 31975 (21 Treas. Dec. 446).

3. THE FUNCTION OF A PRO FORMA INVOICE.

A pro forma invoice is for entry purposes a recognized lawful invoice made under oath as a substitute for a regularly certified invoice; a penalty for undervaluation in such an invoice may be inflicted and an entry on a pro forma invoice is such an entry as the language of section 7, customs administrative act of 1890, should and must apply to, namely, "the duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

United States Court of Customs Appeals, October 16, 1911.

TRANSFERRED from United States Circuit Court of Appeals, Second Circuit, Abstract 19656 (T. D. 29267).

[Reversed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Oppenheimer & Arnold for the appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

This is an appeal from the judgment of the Circuit Court for the Southern District of New York sustaining the decision of the Board of General Appraisers. The board reversed the action of the collector.

The undisputed facts are, that about April 25, 1907, the appellees made an entry of imitation horsehair upon a pro forma invoice, showing the value of the horsehair at 19 marks per kilogram. At the time the entry was made the importers did not know the true value of the horsehair, but stated the same in said invoice upon the basis of earlier shipments. This entry was made in order to get possession of the goods as promptly as possible. Within a few days, and not later than May 2, the importers received and filed in the customhouse a duly certified consular invoice showing the cost of the horsehair to be 18.50 marks per kilogram.

May 9 the assistant appraiser made a return on the pro forma invoice showing it to be correct, and apparently on the same day the appraiser's approval was indorsed thereon. Then follows the collector's notation upon the pro forma invoice, showing the entered value to be the same as the amount so approved by the appraiser. May 13 the collector returned the pro forma invoice to the appraiser at his request; on the next day it was returned to the collector by the assistant appraiser with a notation thereon addressed to the collector stating that the correct value was 18.50 marks per kilogram instead of 19 marks as stated in the pro forma invoice. No approval on the part of the appraiser of this action of the assistant appraiser is shown, and the indorsements on the pro forma invoice conclude with that of the collector in the following words: "No reduction in entered value allowed."

The collector liquidated the entry May 28 at the value of 19 marks per kilogram, refusing to allow any reduction in the entered value upon the ground that the attempted second appraisement on the part

of the assistant appraiser, if it was such, shown as above, after the pro forma invoice had first been returned to him by the appraiser, was unwarranted and illegal, and that the liquidation of the entry must be governed by section 32 of the act of July 24, 1897, providing that—

The duty shall not however be assessed in any case upon an amount less than the invoice or entered value.

The importers did not apply for leave to amend their entry under the provisions of article 1449 of the Customs Regulations of 1899 then in force, did not claim a clerical error had been made in their entry, and did not ask for a reappraisal under section 13 of the customs administrative act of June 10, 1890.

The material part of the protest was as follows:

We claim that your assessing duty on our pro forma invoice value is unjust for the reason that we notified the collector in ample time before our goods were examined that our pro forma invoice value was wrong, and submitted to him our consular invoice bearing the correct market value of these goods. When upon examination the appraiser reported the correct market value to be that amount which appeared on the consular invoice, and upon liquidation the collector assessed duty on the pro forma invoice amount, whereby the duty, as per G. A. 5856 (T. D. 25801), should have been assessed upon the consular invoice value, which was reported to be correct by the appraiser.

The Board of General Appraisers held that "the merchandise should have been assessed for duty upon the value in the consular invoice, the appraiser having approved that value," and relied as authority for such holding upon the Foard case (T. D. 28796), to which reference will later be had.

The United States appealed to the Circuit Court for the Southern District of New York, where, as stated, the action of the Board of General Appraisers was affirmed, but no written opinion appears to have been filed in the case. The United States again appealed to the Circuit Court of Appeals for the Second Circuit, and before hearing there the case was duly removed to this court.

At the time the entry was made the certified consular invoice had not arrived and a bond was given for its production pursuant to the provisions of section 4 of the customs administrative act of June 10, 1890. The conditions of the bond were as follows:

Now, therefore, the condition of this obligation is such that if the above bounden obligors, or either of them, or either of their heirs, executors, or administrators, shall and do, within six months from date hereof; produce to the collector of the customs for the district a duly authenticated invoice of the said goods, wares, and merchandise, and shall pay to the said collector the amount of duty to which it shall appear by such invoice said goods, wares, and merchandise are subject, over and above the amount of duties estimated on the appraisement of said goods, wares, and merchandise, then the above obligation to be void; otherwise to remain in full force and virtue.

It is not claimed that the importers did not act in good faith.

As already appears, the Board of General Appraisers in its decision said that the appraiser had approved the value stated in the consular invoice. We have recited all the evidence appearing of record upon that subject and are at a loss to know how this conclusion could have been reached by the board. Counsel for appellees do not suggest how this statement in the finding of the board can be sustained.

The law then apparently in force (Rev. Stat., sec. 2615), with reference to assistant appraisers at the port of New York, provided that they should "examine and inspect such goods, wares, and merchandise as the appraiser may direct and truly report to him the true value thereof according to law. Such reports shall be subject to revision and correction by the appraiser, and when approved by him shall be transmitted to the collector and shall be deemed an appraisement by the United States local appraiser of the district of such merchandise required by law." (See also Rev. Stat., sec. 2943.)

In this connection we notice that by section 1 of the act of July 27, 1866, which seems still to be in force, it is provided that the appraiser "in cases of his necessary and occasional absence may perform his functions *ad interim* by deputy designated by him in writing from the assistant appraisers."

No claim is made in this case, however, that the assistant appraiser who attempted what may be called this second appraisement was deputized as above provided. Neither does his signature nor report import such authority. In addition, such action on his part was ignored by the collector, who recognized only the appraisal as made by the assistant and approved by the appraiser as final and the value ascertained thereby to be the appraised value of the importation.

Under section 13 of the customs administrative act, hereinafter quoted, the return of the appraiser to the collector, unless reappraisement is had as therein provided, establishes the appraised value of the importation.

Under article 1241 of the Customs Regulations of 1899 the return of the appraiser could not be reconsidered or modified by him after it was lodged with the collector except in case of clerical error. No statute or authority has been called to our attention which warrants the conclusion that the appraiser has authority, unless it be in case of clerical error, to change an appraisement once made and returned to the collector. To so hold might involve inextricable confusion and uncertainty and work delay in the due administration of the revenue laws contingent upon the change of mind or a whim upon the part of an appraiser. Of course an assistant appraiser could have no such authority.

We think that an appraiser after having once performed the duty of appraisement in respect to any particular merchandise and after having made his return thereof to the collector has no authority of his own volition to make another appraisement of the same mer-

chandise. It follows, therefore, that the collector was justified in disregarding the attempted reconsideration or modification, if it may be so called, of the first appraisement made in this case, and that it was his duty to recognize, as he did, that the value of the importation was fixed by the appraisal made thereof and returned to him on the 9th day of May, 1907, unless it may hereinafter for other reasons be found invalid.

It will be observed that from this appraisement the importers took no appeal.

We do not lose sight of the contention on the part of the appellees that the proceedings which we have already recited do not constitute in law an appraisement.

In the case of *United States v. Frank & Lambert* (2 Ct. Cust. Appls., 239; T. D. 31973), heard at our September term, 1910, and which is considered with this case, we have more fully discussed this question, and reference may be had thereto for a full expression of our views upon this subject. It is sufficient here to say that in view of the statutes and the adjudicated cases, amongst which are *Arthur v. Unkart* (96 U. S., 118), *Gibbs v. Washington* (1 McAll., 430), and *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217), we conclude that, unless the same becomes of no force by reason of matters hereinafter considered, the appraisement in this case was duly and lawfully made.

The further and important question in this case is whether, when an entry, in the absence of a duly certified invoice as required by law, is made upon an affidavit and a statement in the form of an invoice or otherwise, showing the actual cost of the merchandise and the statutory bond given for the production of the certified invoice, such proceedings are purely tentative, and it then becomes the duty of the customs officers to withhold appraisement and liquidation until the certified invoice required by law has been produced within the term of the bond, or, in default thereof, the bond has been declared forfeited. Of course if these proceedings are tentative the appraisement made, as appears above, was premature and goes for naught.

It is said that this matter is of much importance as affecting customs practice, and it seems from the various decisions to which we are referred that the question has been one of doubt, both on the part of the board and of the courts.

We insert here so much of the provisions of the customs administrative act of June 10, 1890, as amended by the act of July, 1897, and which constitutes the statute law in force when this importation was made, as seems to be involved in the determination of the question.

SEC. 2. That all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made or, if purchased in the currency actually paid therefor, shall contain a correct description of such merchandise, and shall be made in triplicate or in quadruplicate in case of merchandise intended for immediate transportation without appraisement, and signed by the person

owning or shipping the same, if the merchandise has been actually purchased, or by the manufacturer or owner thereof, if the same has been procured otherwise than by purchase, or by the duly authorized agent of such purchaser, manufacturer, or owner.

SEC. 3. That all such invoices shall, at or before the shipment of the merchandise, be produced to the consul, vice consul, or commercial agent of the United States of the consular district in which the merchandise was manufactured or purchased as the case may be, for export to the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, manufacturer, owner, or agent setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, and the actual cost thereof and of all charges thereon, as provided by this act; and that no discounts, bounties, or drawbacks are contained in the invoice but such as have been actually allowed thereon; and when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported; that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade, in the usual wholesale quantities, and that it includes all charges thereon as provided by this act; and the actual quantity thereof; and that no different invoice of the merchandise mentioned in the invoice so produced has been or will be furnished to anyone. If the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser.

SEC. 4. That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding one hundred dollars in dutiable value shall be admitted to entry without the production of a duly-certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee, before the collector or his deputy, showing why it is impracticable to produce such invoice; and no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of such merchandise, if purchased, or if obtained otherwise than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; which statement shall be verified by the oath of the owner, importer, consignee, or agent desiring to make entry of the merchandise, to be administered by the collector or his deputy, and it shall be lawful for the collector or his deputy to examine the deponent under oath touching the sources of his knowledge, information, or belief in the premises, and to require him to produce any letter, paper, or statement of account, in his possession, or under his control, which may assist the officers of customs in ascertaining the actual value of the importation or any part thereof; and in default of such production when so requested, such owner, importer, consignee, or agent shall be thereafter debarred from producing any such letter, paper, or statement for the purpose of avoiding any additional duty, penalty, or forfeiture incurred under this act, unless he shall show to the satisfaction of the court or the officers of the customs, as the case may be, that it was not in his power to produce the same when so demanded; and no merchandise shall be admitted to entry under the provisions of this section unless the collector shall be satisfied that the failure to produce a duly certified invoice is due to causes beyond the control of the owner, consignee, or agent thereof: *Provided*, That the Secretary of the Treasury may make regulations by which books, magazines, and other periodicals published and imported in successive parts, numbers, or volumes,

and entitled to be imported free of duty, shall require but one declaration for the entire series. And when entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice the collector shall require a bond for the production of a duly certified invoice.

SEC. 5. That whenever merchandise imported into the United States is entered by invoice, one of the following declarations, according to the nature of the case, shall be filed with the collector of the port, at the time of entry by the owner, importer, consignee, or agent; which declaration so filed shall be duly signed by the owner, importer, consignee, or agent, before the collector, or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments, who may be designated by the Secretary of the Treasury to receive such declarations and to certify to the identity of the persons making them, under regulations to be prescribed by the Secretary of the Treasury; and every officer so designated shall file with the collector of the port a copy of his official signature and seal: *Provided*, That if any of the invoices or bills of lading of any merchandise imported in any one vessel, which should otherwise be embraced in said entry, have not been received at the date of entry, the declaration may state the fact, and thereupon such merchandise of which the invoices or bills of lading are not produced shall not be included in such entry, but may be entered subsequently. * * *

[Here follow appropriate forms which it is not material to insert.]

SEC. 7. That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice or statement in the form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by, the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the

particular article or articles in each invoice which are undervalued: *Provided further*, That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after "but not before" such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. * * *

It may be stated at the outset that an entry made on affidavit and statement in the form of an invoice or otherwise is generally known as an entry made upon a pro forma invoice, and will usually be so referred to here.

It will be observed that the most careful scrutiny of these sections fails to discover any express provision that the proceedings on a pro forma entry are tentative purely and so appraisement and liquidation are to be suspended until the certified invoice is produced or the bond forfeited; but it having been stated in some decisions, which will later be referred to, that such has been the practice, and is the law, we proceed to examine as briefly as may be the history of legislation upon the subject, and to consider so far as is ascertainable what the practice in this regard has been.

It appears in chapter 4, Title XXXIV, of Revised Statutes, that as early as 1799 the owner or consignee of merchandise imported or their agent at the time of entry thereof was required to produce the original invoice and give in writing certain information relating thereto, designed to aid in the ascertainment of its value. If the particulars of any merchandise were unknown, entry was permitted to be made according to the circumstances of the case, provided the party making the same declared upon oath such knowledge as he might possess or his belief in the premises, stating that he had no other, and the collector whenever an entry was imperfect for want of invoices, bills of lading, or other causes, was required to take the merchandise into his custody until the quantity, quality, or value thereof, as the case might be, could be ascertained. (See Rev. Stats., secs. 2785, 2786, 2787, 2788, and 2789.)

By the act of March, 1823, it was in substance provided that no entry of merchandise subject to an ad valorem duty should be made,

unless "the true invoice of the same be presented to the collector at the time of entry," but it was further enacted that in certain cases where no invoice had been received the collector, if he deemed expedient, might permit an entry on appraisement to be made if the person making the same gave a sufficient bond to produce the invoice within a time stated, and it was also provided that when the invoice was wanting and the merchandise was imported and not entered, it should be deposited in a public warehouse at the expense and risk of the owner until the invoice was produced. (See 3 Stat. L., 729.)

The act of March, 1863, required that all invoices of imported merchandise should be presented to the consular office abroad for certification to be made thereon, showing, among other things, the price paid therefor, and that no merchandise imported into this country should be admitted to entry unless the invoice presented contained such certificate. The invoices and certificates were to be made in triplicate, one of which was to be delivered to the person presenting the invoice, another to be kept by the consul, and the other transmitted by him to the collector of the stated port of entry in this country. It was also provided that if, on account of any change in the destination of the goods, after the production of the invoice to the consul, or from other cause, the triplicate transmitted to the collector of the port to which the merchandise was originally destined should not have been received at the port where the merchandise actually arrived, that entry might be made provided that a bond was given for the payment of the duty which might be found to be actually due thereon, in which case the collector at the port of entry was required to immediately notify the certifying consul, whose duty thereupon was to transmit a certified copy of the triplicate remaining in his hands. In that event it was provided "said duty shall not be finally liquidated until such triplicate or certified copy thereof shall have been received: *Provided*, That such liquidation shall not be delayed longer than eighteen months from the time of making such entry."

The act further provided that when from accident or other cause it was impracticable for the person desiring to make an entry of merchandise to produce at the time any invoice required by law it should be lawful for the Secretary of the Treasury to authorize an entry of such merchandise upon such terms and in accordance with such general or special regulations as he might prescribe. (12 Stat. L., 737, 738, 739.)

We note here that no reference to delayed liquidation is found in this act, except as above stated.

By the act of June, 1874, sometimes known as the "antimoietty act," Congress expressly and for the first time appears to have authorized an entry to be made in the absence of the certified invoice,

provided the person making the entry made affidavit showing why it was impracticable to produce such invoice, and accompanied the entry by a statement in the form of an invoice, or otherwise, also under oath, showing either the actual cost of the merchandise, or to the best of the knowledge, information, and belief of the deponent, the foreign market value thereof; and it was further therein provided that the collector might examine the person making such entry under oath touching the source of his knowledge or belief in the premises and require him to produce any letter or paper in his possession or under his control which might assist the customs officers in ascertaining the dutiable value of the merchandise. (See 18 Stat. L., 186, 187, 188.)

Section 4 of the customs administrative act of June 10, 1890, above quoted, is a substantial reenactment of the statute last referred to, and in addition provides that when entry of merchandise exceeding \$100 in value is made upon a statement in the form of an invoice the collector shall require a bond for the production of a duly certified invoice.

It should be observed here that nearly if not all the foregoing statutes refer to the entry of merchandise, not personal effects accompanying a passenger, and where the value thereof exceeds \$100.

Beginning with the customs regulations of 1857, which are the earliest to which our attention has been called, it has always been required when an entry has been made upon a pro forma invoice, whether such entry was permitted only in the discretion of the Secretary of the Treasury, or was expressly authorized by statute, that a bond conditioned substantially like the one given in this case should be furnished by the person making the entry, and the bond has always in substance provided for the payment of such additional amount of duty as it shall appear by the certified invoice the importation was subject, over and above the amount estimated on the assessment thereof. (Customs Regulations of 1857, art. 213; 1874, art. 334; 1884, art. 326; 1892, art. 285; 1899, art. 394.)

It appears that subsequent to the act of 1874 and until October, 1878, entries, when permitted to be made upon a pro forma invoice, were treated as to their liability to penal duties in case of undervaluation in the same manner as entries made upon a duly certified invoice, or other invoice, required by law. (Report of the Secretary of the Treasury on the collection of duties, 1885, pp. 64-65, and Customs Regulations of 1874, arts. 341, 486.)

In 1878 an importer raised the question that section 2900 of the Revised Statutes providing for the collection of additional duties in cases of undervaluation in entries did not apply to an undervaluation made in a pro forma invoice. The Attorney General considered the matter and sustained the contention of the importer. (See Opins. Gen., vol. 16, pp. 158-161.)

It also appears from the report of the Secretary of the Treasury on the collection of duties, 1885, pages 64 and 65, and the report of the same official on the revision of the tariff, 1886, pages xxxii and xxxiii, that consequent upon the foregoing ruling of the Attorney General the number of entries upon pro forma invoices had astonishingly increased and the Secretary submitted in these reports facts that then seemed to warrant the belief that large frauds upon the revenue were practiced under the guise of these pro forma invoices. The attention of Congress was, by the Secretary, invited to this subject and legislation suggested to relieve the situation and prevent the claimed existing frauds.

The Secretary of the Treasury, in his report, December 3, 1888 (see H. Ex. Docs., 2d sess., 50th Cong., p. xxxi), again referred to the subject of merchandise entered upon pro forma invoices and recommended—

The amendment of the law so as to subject merchandise entered upon a pro forma invoice to the same conditions as are imposed in case of entry upon "original" or regularly certified invoices.

Congress, by section 7 of the customs administrative act of June 10, 1890, either in reply to the recommendations of the Secretary of the Treasury, to which we have referred, or for other considerations which were presented to it, enacted—

That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice. * * * The duties shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

Since the enactment of this statute it appears to have been considered that the penalty for an undervaluation applies to the value stated in a pro forma invoice. *United States v. Merck* (91 Fed. Rep., 641); *In re Leggett & Co.* (T. D. 10548).

But the Treasury Department, as it already appears, held that the previous statutes should receive the same construction and had so applied them until the adverse ruling on the subject by the Attorney General in 1878. That this attitude of the Department was not wholly without show of reason may be gathered from a brief review of the statutes upon which it was based. In 1846 (9 Stat. L., p. 43) it was provided—

That under no circumstances shall duty be assessed upon an amount less than the invoice value, any law of Congress to the contrary notwithstanding.

And similar provisions are found in the act of March 3, 1857 (11 Stat. L., 199), act of March 3, 1865 (13 Stat. L., 491-494), act of July 28, 1866 (14 Stat. L., 328-330); Rev. Stats., sec. 2900), in which the precise language was, "the duty shall not, however, be assessed upon an amount less than the invoice or entered value."

The Treasury Department, in addition to its persistent and consistent claim upon this subject, had kept in its regulations during all the time substantially the following provisions relating to this subject:

Where imports have been entered on affidavit and statement, in the absence of an invoice, and the value in the invoice afterwards produced is less than that found by the appraiser on the entry, no allowance by return of duties can be made for the difference. But if the invoice shows a value greater than that ascertained by the appraiser, the United States will be entitled to duties on such excess value. (Cust. Regs. of 1857, art. 360; 1874, art. 341; 1884, art. 329; 1892, art. 285; 1899, art. 394.)

And there is nothing whatever in this case tending to show, and it is not claimed, that these regulations have not been enforced, except as hereinafter appears.

Congress must be presumed to have legislated upon this subject having in view this long-continued departmental construction of the statute law, and in interpreting its enactments such executive construction becomes important. *Komada v. United States* (215 U. S., 392).

But it is urged that, notwithstanding the foregoing construction of the statutes by the Treasury Department and the practice thereunder, the courts have held the contrary view and that we should follow the same.

Space does not permit or necessity require an extended review of all the decisions to which our attention has been called. It is safe to say at the outset that they are irreconcilable.

To illustrate, in the case at bar the board relied upon its own decision in Foard's case (T. D. 28796), decided February 18, 1908. It appeared there that an overvaluation of importation had been made in the pro forma invoice by including therein the amount of certain concededly nondutiable charges. Thereupon the appraiser indorsed on the entry "value correct," returned the same to the collector who treated it as an appraisement and thereon proceeded to liquidation. Thereafter the consular invoice was duly produced which showed the error. The board held that the appraiser's action did not constitute an appraisement and relying upon the Commercial Cable Co. case, to which reference will later be made, held that duty should be taken upon the value shown in the consular invoice. Their decision, however, was upon appeal, and without any written opinion being filed reversed by the Circuit Court for the District of Maryland (T. D. 30936).

In the case at bar the decision of the board has been affirmed in the Circuit Court for the Southern District of New York, also without any written opinion being filed, and we are not, therefore, aided in this case by the reasoning of these two learned courts whose views seem to be at variance upon the question involved here.

We are cited to no decision prior to the case of *United States v. Commercial Cable Co.* (141 Fed. Rep., 473), decided May 24, 1905, either of the Board of General Appraisers or of a court which seems to be in point upon the question involved here.

In the last-mentioned case the facts were as follows: Entry was made on a pro forma invoice April 19, 1904, and before appraisal the importers produced an invoice duly certified by the consul abroad which was filed with the collector April 21. May 3 the appraiser made his return, approving the value named in the certified invoice, which was less than that stated in the pro forma invoice. The collector assessed duty upon the value based upon the pro forma invoice. The importers contended that it should have been upon the valuation shown by the certified consular invoice and the return of the local appraiser. The Board of General Appraisers sustained the protest.

The collector evidently proceeded upon the theory that duty ought not to be taken in any event upon an amount less than the entered value, which was that stated in the pro forma invoice. In their decision the board said:

The rule is well settled that an entry on a pro forma invoice remains "open" until the conditions of the bond for the production of the consular invoice have been fulfilled or until the bond itself has become forfeited. * * * The importer's bond for the production of the duly certified invoice is usually conditioned for the payment of such duties as may be found due above the estimated duties. Customs administrative act, June 10, 1890, section 4, provides that "when entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice (meaning a pro forma invoice), the collector shall require a bond for the production of a duly certified invoice." Unless corrections of value and of liquidation can be made upon the basis of the consular invoice when obtained and approved by the appraiser the provisions of this section would be nugatory. Where an importer gives a bond for the production of necessary documents, or where the collector waives the giving of such bond, the importer's rights are preserved. * * * An entry made upon a pro forma invoice is necessarily tentative and liable to correction on the production of a corrected invoice, duly authenticated, when filed in time. * * * We are of opinion that the giving of the bond required by statute preserved the rights of the importers and left the entry open, it having been made on a mere pro forma invoice. Upon the subsequent production of the consular invoice and on its approval by the appraiser the importers were entitled to have the entry liquidated on the basis of the appraised value corresponding with the value shown by the consular invoice.

The board cites the following cases in support of its conclusion: *In re Courtin* (T. D. 23557); *Carnes v. Maxwell* (3 Blatch., 420; 5 Fed. Cases, 90); *Schneider v. Barney* (6 Fed. Rep., 150); *Howland v. Maxwell* (3 Blatch., 146; 12 Fed. Cases, 742); *Gillespie v. United States* (124 Fed. Rep., 106).

Upon appeal by the United States the Circuit Court for the Southern District of New York affirmed the decision of the Board of General Appraisers without filing any opinion. The United States did not appeal from this decision, and the case is mainly relied upon by the importers here.

It may be observed that in the Commercial Cable Co. case it appeared that the only appraisal made fixed the value of the merchandise at that shown by the consular invoice, while in the case at bar the appraisal fixes the value at that shown by the entry made upon the pro forma invoice, and in that respect the cases differ. If,

however, it is the law, as stated by the board in the opinion last quoted, that the proceedings in an entry made upon a pro forma invoice remain open until the conditions of the bond have been fulfilled or until the bond itself becomes forfeited, it must result that the appraisement made in the case before us is a nullity.

This decision of the board as affirmed by the court seems to be utterly at variance with the customs regulations and with the construction given to contemporaneous statutes by the Treasury Department, as heretofore set forth, to the effect that duty in no case should be taken upon an amount less than the invoice or entered value, and, as already suggested, it seems to be the first decision in which it has been definitely said that the proceedings in an entry upon a pro forma invoice were purely tentative until the certified invoice was produced or the bond forfeited.

We consider briefly the cases relied upon by the board in its opinion.

In the *Courtin* case, decided in 1902, the issue was whether certain valid existing regulations relating to importation of goods, claimed to be of American origin and therefore entitled to free entry, had been complied with. The board held, in view of the circumstances, that a sufficient compliance had been made.

In *Carnes v. Maxwell*, which was decided in 1856 in the Circuit Court for the Southern District of New York, the entry was made in conformity to a mistake in value stated in an original invoice and as a result of which the entered value was too small. The importers immediately discovered the mistake, notified the customs officers thereof, obtained a correct invoice, delivered the same to the customhouse and requested permission to correct the error. Duties were paid on the erroneous value and also the penal duty for undervaluation. There was no appraisal of the entry before the corrected invoice was produced. The court held under those facts that the collector had no right to impose the penal duty, relying upon a decision theretofore made in the case of *Howland v. Maxwell*, decided in 1853 in the same circuit court.

In that case the value of the merchandise was stated as it appeared in the original invoice, which was erroneous in that respect. Before appraisal, a corrected invoice was received and permission asked by the consignee who made the entry to correct the error by stating the value to correspond with that shown by the corrected invoice. The collector refused to allow this. The appraiser valued the merchandise as shown in the erroneous invoice and the penal duties were assessed. The court held that the oath of the consignee upon the entry made it his duty to acquaint the collector of the second invoice, and that, the same having been received and filed in the customhouse before any action had been taken there to determine the value of the importation, the plaintiffs had a right on a question

of duties merely to claim that the valuation of the importation ought to be made upon the corrected invoice and not upon the one first produced. In this case the court said:

Had the goods been seized for a fraudulent undervaluation, or had an appraisal been made upon the entry before the corrected invoice was produced, the question on this point might stand on different grounds. .

In the case of *Schneider v. Barney*, decided March 12, 1888, in the Circuit Court for the Southern District of New York, a corrected invoice was made and received before any appraisal; was accepted by the collector as the true invoice, and the original entry was made to correspond to the corrected invoice. It does not appear whether or not the entry was made upon a pro forma invoice. The value shown by the corrected invoice was greater than that stated in the entry and one question was whether the penal duty could be collected for the undervaluation made in the invoice. The court held that upon the authority of *Howland v. Maxwell* the valuation was properly made upon the corrected invoice and also that the penal duties should not have been assessed.

In *Gillespie v. United States*, decided May 24, 1900, the entry was not made upon a pro forma invoice, but the importers, by mistake, had included the value of certain containers in the value of the merchandise, which containers being of American manufacture were not dutiable. Immediately after entry the importers deducted the value of the containers and pointed the same out to the collector who assented to the correction, but the naval office refused to allow the correction to be made. Before liquidation the corrected invoice was procured, but the collector refused to make the allowance, alleging that the provision of section 7 of the customs administrative act of 1890 provided that duty should not be taken in any case upon an amount less than the invoice or entered value. The Circuit Court for the Southern District of New York sustained the importer's contention, reversing the Board of General Appraisers. In overruling the board, the court in that case stated that it clearly came within the rule laid down in *United States v. Benjamin* (72 Fed. Rep., 51) and *United States v. Zuricaldy* (71 Fed. Rep., 955).

An examination of these two cases last referred to by the court shows that the first involved the question of whether the value in an entry which was practically made under duress and was occasioned by an unauthorized act of the United States consul abroad was conclusive upon the importer. The court held that it was not. The second involved the question of a clerical error, and is not in point because no clerical error is claimed here.

The foregoing decisions do not to us seem to warrant the statement in the decision of the board that an entry upon a pro forma invoice should be held open until the certified invoice is produced or the bond given for its production has been forfeited. Neither do we

think that they are authority for holding that the liquidation can be upon an amount less than the entered value in case an entry is made upon a pro forma invoice, no manifest clerical error or duress appearing.

We are brought, therefore, to the question of whether the decision in the case of *United States v. Commercial Cable Co.* shall be followed here.

We are not concerned in this case with clerical errors because no such error is claimed. In addition to this the customs regulations since and including 1857 have contained provision for relief from mistakes in the assessment of duties resulting from a manifest clerical error. (Cust. Regs. of 1857, art. 208; 1874, art. 534; 1884, art. 611; 1892, art. 925; 1899, art. 1455.)

Some of the cases relied upon by the importers, which we have not specifically mentioned, lose their supposed controlling force because of the fact that the decisions turn upon manifest clerical errors, or upon an entry made under duress, and no duress here is claimed.

The suggestion made in the decision of the Board of General Appraisers in *United States v. Commercial Cable Co.*, that unless corrections of value and liquidation can be made upon the basis of the consular invoice when obtained, the provisions of section 4 of the customs administrative act that the importer should produce the duly certified invoice when received would be nugatory, evidently did not take into consideration that this provision is obviously for the protection of the Government and to prevent undervaluation, or that the customs regulations since and including 1857 have contained provisions evidently designed to relieve the importer in proper cases. (Cust. Regs. of 1857, art. 295; 1874, art. 530; 1884, art. 607; 1892, art. 920; 1899, art. 1449.)

These regulations in substance provide that in view of the oath prescribed by law to be taken on entry, making it the duty of the importer in case he discovers at any time after entry any error in the invoice or account produced or receives any other invoice, he shall immediately make the same known to the collector, and that whenever such error is brought to the notice of the collector before "the invoice or account has come under the observation of the appraisers, or any examination has been made of the goods, and application under oath is made to amend the entry by the importer, such application shall be transmitted to the Secretary of the Treasury for such action as may be deemed proper."

From what already appears we conclude that it has always been contemplated when merchandise dutiable at ad valorem rates is imported there shall be presented at the time of entry the original or certified invoice thereof, or a certified copy as the law may have provided, showing the cost of the merchandise so that the appraiser might take the cost into consideration in determining the value for

the assessment of duty. Any variation from this rule when made by regulations or by statute has been for the convenience of the importer.

The controversies and adjudications which have arisen and been had as to undervaluation in a pro forma invoice are, though instructive, not controlling here, because there is a difference between the imposing an additional or penal duty for an undervaluation and the assessment of the prescribed legal rate upon the valuation which the importer sees fit to place upon his goods. The latter is accepting his judgment of the value as a sum below which the value will not be placed, and which may be raised, and the former is imposing a penalty for what is in theory an attempt to evade or avoid the tariff laws. The importer has his option to take advantage of the provision for his benefit, namely, the privilege of entering his goods upon a pro forma invoice or not as he pleases, and has no just ground for complaint if, for the purpose of permitting immediate entry when he has not the papers the law requires him to have or produce, the Government takes him at his word as to the minimum value of his merchandise. Who should know better than he, or who can more quickly or easily ascertain the value of the merchandise he may desire to enter?

The fact that in making provision for an entry in the absence of the original or certified invoice there is only one instance found in the statutes where a delay in liquidation has been provided for, is suggestive of the fact that it was in other cases contemplated liquidation should proceed without delay upon such an entry the same as in other cases.

The Customs Regulations of 1899, article 1420, seem to so contemplate.

The value stated in an entry upon a certified invoice, no duress or manifest clerical error appearing, is, under the provisions of section 7 of the customs administrative act, conclusive upon the importer and duty can not be assessed upon a less value by the collector. *Daloz v. United States* (171 Fed. Rep., 275); *Vantine v. United States* (91 Fed. Rep., 519); *Kimball v. The Collector* (10 Wall., 436, 450); *In re Irwin* (T. D. 25764); *In re Schulze-Berge-Koechl* (T. D. 10533); *Ullman v. United States* (1 Ct. Cust. Appls., 61).

We think, in view of the circumstances under which this section was enacted and in view of the unambiguous language there used, no distinction in this regard can be made between an entry made upon a certified invoice and one made upon a pro forma invoice.

The pro forma invoice is recognized by law. It is made an invoice for entry purposes in the absence of the certified invoice for the purposes of section 5 of the act, and, like it, must be under oath. It is an invoice for the purpose of fixing the penalty for undervaluation under section 7 thereof, and we are unable to conclude that it is not

an invoice for the purpose of the last sentence of that section: "The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

It was said in substance by the Supreme Court in *Marriott v. Brune et al.* (9 How., 619), relating to the act of 1846 providing that "under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, any law of Congress to the contrary notwithstanding," that this provision created a species of estoppel so far as not to let the entered value be made lower than was originally admitted in the invoice, and it was not there intimated that there was any doubt that the statute warranted that construction. See also *Sampson v. Peaslee* (20 How., 571).

In *Roebbling v. United States* (77 Fed. Rep., 601) it was held in substance that although the importer had included in his entered value, which was based on the original invoice, certain items that were not in law a part of the value, yet, the same having been voluntarily included by him could not after appraisal be deducted by the Board of General Appraisers upon hearing of the protest, although it was said that if the appraiser had added the same items they might have been deducted by the board.

This holding was based upon the opinion of the Supreme Court in *Oberteuffer v. Robertson* (116 U. S., 499), where a similar doctrine was announced. The analogy is plain. One of the grounds upon which the importers here claim relief is that it is a hardship to be compelled to pay duty upon a value which is concededly too high. A like hardship was apparent in the case last cited, but the court held that the provisions of Revised Statutes, section 2900, that duty can not be assessed upon an amount less than the invoice or entered value was plain, and that—

Whatever is put down in the invoice and entry as the value of the goods *per se* can not be diminished, although in fact there may have been included in such value the cost of cartons and packing, unless the invoice or entry shows distinctly what such cost was and that it was included.

In the case last referred to, as here, the importer was compelled to pay on his own valuation of the goods, which was in fact too high; but the hardship is no greater upon the importer and he is no more deserving of relief when the entered value of his goods, based upon a pro forma invoice, is too high than when the same conditions exist in an entry based upon a duly certified invoice.

It is perhaps unnecessary to add that if the importer's declaration of value made with an entry is obtained by duress he is not thereby estopped. In harmony with well-settled legal principles, the law does not recognize that to be his voluntary act, as a consequence of which he can not in a proper case be heard to question the value so declared. *Robertson v. Bradbury* (132 U. S., 491).

The claim that the proceedings in case of an entry upon a pro forma voice are tentative and must be held open would seem to be un-

supported by authority or reason. There must, we think, of necessity always be at the time of an entry an invoice or entered value not reducible by the importer after appraisement, unless there is a manifest clerical error or duress, to which duty at once attaches, and that the statement of this nonreducible amount by the importer can not at his option be deferred through the device of a pro forma entry with the accompanying bond.

If in any case it shall happen than an importer's knowledge of the value of his goods is so imperfect as not to warrant an entry upon a pro forma invoice, in view of this interpretation of the statute, if such a case be supposable, he can defer his entry until the requisite knowledge is obtained or the certified invoice has arrived.

We think the learned Circuit Court erred in sustaining the action of the Board of General Appraisers in this case, and the result is that its judgment is *reversed*.

UNITED STATES *v.* HARTWIG (No. 523).¹

FOX SKINS, DRESSED, DYED, AND POINTED, "MANUFACTURES."

Alaska fox skins that have been dressed and dyed and pointed by the insertion in the fur at intervals of white hairs from the badger, these white hairs being glued to the skin and making them an imitation silver-fox skin, since a new article is thereby made, with a new name, character, and use, constitute a manufacture, but not a manufacture of furs prepared for use as material, and the skins were dutiable at 20 per cent ad valorem, whether taken by similitude as furs dressed on the skin or as nonenumerated manufactured articles.

United States Court of Customs Appeals, October 16, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7117 (T. D. 31018).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Brown & Gerry (*James L. Gerry* and *Allan R. Brown* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of certain fox skins which were entered at the port of New York on October 21, 1909. Some of the skins were assessed for duty by the collector at 50 per cent ad valorem as fur wearing apparel partly made, and some of them at 35 per cent ad valorem as manufactures of furs, under the provisions of paragraph 439 of the tariff act of August 5, 1909, which reads as follows:

439. Furs dressed on the skin, not advanced further than dyeing, but not repaired, twenty per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, including plates, linings, and crosses, thirty-five per centum ad valorem; articles of wearing apparel of every description, partly or wholly manufactured, composed of or of which fur is the component material of chief value, fifty per centum ad valorem. Furs not on the skin, prepared for hatters' use, including fur skins carotod, twenty per centum ad valorem.

¹ Reported in T. D. 31976 (21 Treas. Dec., 464).

Objection on several grounds was taken to the classification and the duty assessed, but the claim set up in the protest upon which the importer really relied was that the merchandise imported was dutiable at 20 per cent ad valorem either under the first clause of said paragraph 439 or under paragraph 480, which is as follows:

480. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

The board was of opinion that the fox skins classified as wearing apparel partly made were at best material prepared for special uses and therefore dutiable at 35 per cent ad valorem. As the importer, however, had not set up that claim in his protest the collector's assessment was permitted to stand.

The fox skins which were classified by the collector as manufactures of furs at 35 per cent ad valorem were held by the board to be similar to furs dressed on the skin and dutiable by similitude under the first clause of paragraph 439 at 20 per cent ad valorem. As to that particular part of the importation the protest was therefore sustained by the board. From the decision overruling the protest as to the articles assessed as "wearing apparel partly made" the importer took no appeal. From the decision sustaining the protest as to the merchandise which was assessed for duty at 35 per cent ad valorem the Government appealed, and that is the appeal which is now before us for consideration.

The goods the classification of which is in controversy are fox skins dressed, dyed, and pointed, and were returned by the appraiser as "manufactures of furs" dutiable at 35 per cent ad valorem under paragraph 439. It appears from the uncontradicted testimony produced on the hearing that the articles in question are made from the pelts of the Alaska fox, which are dressed and then dyed to the general color of the fur of the silver fox. The skins, after dressing and dyeing, are pointed by inserting in the fur at intervals white hairs from the badger, which hairs are glued to the skin to hold them in place. The process of pointing, evidently a tedious one, is intended and designed to give the fur the semblance and aspect of that of the silver fox, a different animal from the one from which the pelt is actually taken. The dressing and dyeing of the furs did not of course make them anything more than furs dressed and dyed on the skin and therefore can not be said to have carried the goods into the category of a manufacture of furs. By the pointing of the furs, however, different materials from independent sources were so artificially brought together that the fur of one animal was given the appearance and, we assume, the more attractive

qualities of another. By the addition of the white hairs of the badger to the original skin the latter was converted into an imitation silver-fox skin, a product which neither in fact nor in trade was a badger skin or an Alaska fox skin, but an entity differing from both and adapted to a commercial use for which neither of its components was fitted or suitable. Such a processing of materials created a new article, with a new name, a new character, and a new use, and therefore, in our opinion, constituted a "manufacture" as that term has been judicially defined. In a well-considered opinion by General Appraiser Fischer (T. D. 22519) the board held that imitation ermine tails made by combining pieces of black fur with pieces of white fur from the coney were manufactures of furs. In that case it was well said:

The goods are, therefore, clearly articles manufactured from two kinds of fur and are no longer merely fur. Their character and form have been changed by labor and they have acquired a new name, character, and use, and their classification must follow that changed condition.

What was there declared with reference to imitation ermine tails we think may be applied with equal force to imitation silver-fox skins, the merchandise which is here under discussion.

The dressed and dyed skin of the Alaska fox thus manufactured into an imitation of that of the silver fox has not been further advanced, however, and can no more be considered as a manufacture of furs *prepared for use as material* than could a true silver-fox skin in the same condition. It has not been cut or shaped for a stole, a muff, or a rug, or prepared as material for the making of any specific article or class of articles. In the sense that out of it something may be made, it is of course a material, but it has not been advanced to the point where it can be identified as a material prepared and suitable for any special or definite manufacturing use. We can not, therefore, sustain the Government's contention that the merchandise in issue is a "manufacture of furs prepared for use as material."

No provision having been made in the tariff act of August 5, 1909, for manufactures of furs in general, it would seem that the merchandise in question should be assessed for duty either under paragraph 480 or under the first clause of paragraph 439, by virtue of the provisions of paragraph 481. Under which of these provisions the importation should be assessed for duty it is unnecessary to decide in this case. Whether the merchandise be held to be dutiable under the first clause of paragraph 439 by similitude to furs dressed on the skin not further advanced than dyeing but not repaired, or under paragraph 480 as a nonenumerated manufactured article, the rate of duty would be 20 per cent ad valorem, which was the rate fixed by the board.

The decision of the board must be *affirmed*.

WORSDELL & Co. *et al.* v. UNITED STATES (No. 548).¹

1. SEAL SPLITS OR SEAL SPLIT LEATHERS.

Paragraph 450, tariff act of 1909, does not cover leathers made from the hides or skins of animals that are not cattle of the bovine species, and as seal splits or seal split leathers are made from animals not of the bovine species, they do not fall within the provisions of that paragraph.

2. GRAIN OR SPLIT LEATHER.

It not having been shown that the terms "grain leather" and "split leather," as used in paragraph 450 of the tariff act of 1909, are applicable in the trade only to leathers which are unfinished, finished leathers of these kinds made from the hides of cattle of the bovine species are dutiable under said paragraph.

United States Court of Customs Appeals, October 16, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24566 (T. D. 31207).

[Affirmed in part, reversed in part.]

Brown & Gerry (James L. Gerry and Allan R. Brown of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified certain leathers imported into the country as leather not specially provided for and assessed it for duty at 15 per cent ad valorem under the provisions of paragraph 451 of the tariff act of August 5, 1909, the material parts of which are as follows:

451. Band, bend, or belting leather, rough leather, and sole leather, five per centum ad valorem; dressed upper and *all other leather*, calfskins tanned or tanned and dressed, kangaroo, sheep and goat skins (including lamb and kid skins) dressed and finished, other skins and bookbinders' calfskins, all the foregoing not specially provided for in this section, fifteen per centum ad valorem; * * * patent, japanned, varnished, or enameled leather weighing not over ten pounds per dozen hides or skins, twenty-seven cents per pound and fifteen per centum ad valorem; if weighing over ten pounds and not over twenty-five pounds per dozen, twenty-seven cents per pound and eight per centum ad valorem; if weighing over twenty-five pounds per dozen, twenty cents per pound and ten per centum ad valorem; pianoforte leather and pianoforte-action leather, and glove leather, twenty per centum ad valorem; leather shoe laces, finished or unfinished, fifty cents per gross pairs and ten per centum ad valorem; boots and shoes made of leather, fifteen per centum ad valorem. * * *

The importers protested that the merchandise was either band, bend, or belting leather, or rough or sole leather, dutiable at 5 per cent ad valorem under said paragraph 451 or that it was grain or split leather dutiable at 7½ per cent ad valorem under the provisions of paragraph 450, which reads as follows:

450. Hides of cattle, raw or uncured, whether dry, salted, or pickled, shall be admitted free of duty: *Provided*, That on and after October first, nineteen hundred and nine, *grain*, buff, and *split leather* shall pay a duty of seven and one-half per centum

¹ Reported in T. D. 31977 (21 Treas. Dec., 467).

ad valorem; that all boots and shoes, made wholly or in chief value of leather made from cattle hides and cattle skins of whatever weight, of cattle of the bovine species, including calfskins, shall pay a duty of ten per centum ad valorem; that harness, saddles and saddlery, in sets or in parts, finished or unfinished, composed wholly or in chief value of leather, shall pay a duty of twenty per centum ad valorem.

The Board of General Appraisers overruled the protest and the importers appealed to this court.

In the determination of this case the following questions are involved: First. Were the terms "grain leather" and "split leather" trade terms on and immediately prior to August 5, 1909, the date of the passage of the tariff act; and if they were, did their general, uniform, and definite meaning in the trade cover the merchandise in question? Second. If those terms had no general, uniform, and definite meaning to the trade at the time the tariff act of 1909 was passed, does any of the merchandise come within the common and ordinary meaning of the expressions "grain leather" and "split leather"? Third. Are the provisions of paragraph 450 limited to leathers made from the hides or skins of cattle, that is to say, to leathers of bovine origin?

As to the commercial meaning of the terms "grain leather" and "split leather" the importers produced the testimony of Alfred J. Worsdell, Louis J. Robertson, Gaza Pasquasz, John Donovan, and Thomas R. Fleming, who testified in effect that at the time the tariff act of 1909 was passed, and prior thereto, "grain leather" and "split leather" were trade names generally and well understood by all people dealing at wholesale in leathers; that "split leather" was then and is now the name given by the wholesale trade to the flesh side and "grain leather" the name given to the hair side of a tanned hide after the splitting of such hide by dividing it horizontally so as to separate the hair side from the flesh side; that "grain leather" and "split leather" are general designations, identifying the top and bottom of the tanned hide after splitting, and embrace various special kinds of one class or other, the specific names of which are determined by the use to which the leather is to be finally dedicated and the state and color of the finish; that is to say, an unfinished grain leather or an unfinished split leather is known as a "rough grain" or "rough split," but if finished and intended for the manufacture of orange-colored suit cases the grain or split is designated either as an "orange grain case leather" or as "an orange split case leather," as the case may be. The five witnesses produced by the Government do not deny that the flesh side of a split tanned hide is known as "split leather" and the grain side as "grain leather." They insist, however, that these terms are applicable in the trade only to leathers which are unfinished. This claim on the part of the Government's witnesses loses much, if not all, of its weight, however, first, because they expressly admit that orders for finished grain or finished split leather,

specifying the kind of finish and color desired, are recognized and perfectly understood in the trade and convey to the wholesale dealer accurate information as to what is wanted; second, because they wholly fail to give any name to finished grains and finished splits which would adequately, specifically, or properly describe them; and, third, because their statement that finished grains and finished splits are known to the trade as "case leather" or "bag leather" or "belt leather" is stripped of all probative force when it is considered that the words "case," "bag," or "belt" define the manufacturing use of the leather and nothing more, and that "case," "bag," and "belt" leathers may be either "splits" or "grains." True, the testimony shows that orders for "case leather," without giving the qualifying words "grain" or "split," are not unknown, but the effect of that testimony is nullified by the statement that such orders are construed to mean "grains," and that if "splits" are desired the order must so specify expressly. The testimony of the Government's witnesses and the findings of the board seem to be based entirely on the fact that an order for "grain leather" or "split leather," unaccompanied by any specification of the color or finish desired or of the use to which the leather is to be put, would be commercially construed to mean that the undyed, *unfinished*, hair side or flesh side of a hide which had been tanned and split was required. That such an order would be so interpreted may be admitted. It can not be admitted, however, nor does it follow from that interpretation of that particular kind of an order, that the trade recognizes no grains or splits which are colored or finished. Much less is such a conclusion warranted when it is considered that the record clearly discloses that the words "split" and "grain" are used, accepted, and understood by the trade in ordering colored or finished split leathers and that their actual use in that connection is absolutely necessary in order to define with certainty what is required, except in cases where trade custom has made it safe to assume that a grain and not a split is desired. Quite naturally an order for "grain leather" or "split leather" which was couched precisely in those words and said nothing as to quality or finish would be construed to mean an unfinished grain or split. Such an interpretation of such an order falls short of proving, however, that finished splits and finished grains are unknown to the trade, and especially does it fall short in view of the fact that there is direct, affirmative, and positive evidence to the contrary from witnesses on both sides of the case.

We think the conflict of testimony in this case is more apparent than real, and that the statements of the several witnesses may be readily reconciled on the basis, first, that "grains" and "splits" define the two general classes of split leathers; second, that these general classes are subdivided into various subordinate classes

rding to color and finish, to which appropriate names are given indicating such color and finish; third, that the use of the names of such subordinate classes in ordering is forced by the necessity of expressing what color and what finish on the split or grain is wanted. If, however, we consider the case from the standpoint that the witnesses really differ as to whether there is any such thing known to the trade as a finished grain or finished split, we must still hold that there is a preponderance of evidence in favor of the contention of the importer. Disregarding the fact that Schwartzwaelder, a witness for the Government, defined a split to be the flesh side of a hide that is *finished* or *unfinished*; that other Government witnesses referred to finished and unfinished splits and grains; and that all of them admitted that orders for finished grains and splits of a certain color would be understood by the trade and unmistakably describe what was wanted, the circumstance that three of the five Government witnesses had comparatively little experience with the merchandise imported and did not deal to any great extent in finished grains and splits militates against the weight which might otherwise be accorded to their testimony. Naturally, witnesses whose trade was largely confined to the unfinished article would, in good faith, be disposed to believe and to testify that in the trade there were no "grain leathers" or "split leathers" which were finished, but their testimony in that behalf should not be permitted to counterbalance or outweigh the evidence of witnesses of wider experience. Moreover, even if the witnesses for the Government and for the importer be considered so much at variance that no commercial meaning can be attached to the terms "grain leather" and "split leather," and that the common, ordinary meaning of those expressions must therefore be accepted, we fail to see how that state of the case aids or assists the Government's contention. As popularly understood, "grain leather" would signify a leather which had a grain and "split leather" a leather which had been split, and with such as the meaning of the terms some of the leathers would clearly be included in the former and all of them within the latter designation.

We assume from the decision of the board and the briefs of counsel that the seal splits or seal split leathers mentioned in the record are not made from the hides of bovine animals. • As this court has already decided, in *Tilge v. United States* (2 Ct. Cust. Appls., 129; T. D. 31662), that paragraph 450 does not cover leathers made from the hides or skins of animals which are not cattle of the bovine species, we must therefore hold that the board was correct in excluding from the provisions of that paragraph the seal splits or seal split leathers in question.

The decision of the Board of General Appraisers as to grain leathers or split leathers made from the hides of animals other than those of the bovine species is *affirmed*. As to the other leathers it is *reversed*.

CHOY CHONG WOH & Co. et al. v. UNITED STATES (No. 595).¹**MUSHROOMS IN TINS PACKED IN WOODEN CASES.**

Mushrooms contained in tins, and inclosed in differing numbers of tins, and in wooden cases, may not be deemed mushrooms, cut, sliced, or dried in undivided packages of a given weight and dutiable as such, but are plainly mushrooms contained in tins and are dutiable per pound, the weight of the immediate coverings included, under the first clause of paragraph 251, tariff act of 1909.—United States v. Yamashita (1 Ct. Cust. Appls., 341; T. D. 31435).

United States Court of Customs Appeals, October 16, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24666 (T. D. 31236)

[Affirmed.]

Brown & Gerry (James L. Gerry and Allan R. Brown of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*W. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The appeal covers mushrooms in tins contained in outside wooden cases. Some of the cases contain 20 and others 2 to 4 tins. They were classified for duty at 2½ cents per pound, including the weight of the immediate or tin coverings, and are claimed to be dutiable at the same rate excluding the weight of the tins or immediate coverings, both assessment and claim being made under the applicable provisions of paragraph 251 of the tariff act of 1909. That paragraph reads:

251. Beans, peas, mushrooms, and truffles, prepared or preserved, or contained in tins, jars, bottles, or similar packages, two and one-half cents per pound, including the weight of immediate coverings; mushrooms, cut, sliced, or dried, in undivided packages containing not less than five pounds, two and one-half cents per pound.

The Board of General Appraisers sustained the action of the collector and overruled the protest. From their decision an appeal is taken.

We think the provisions of paragraph 251 are not difficult of interpretation. The first clause of the section imposes a duty alike upon immediate coverings and the contents consisting of beans, peas, and truffles. Whatever the immediate coverings may be, whether tins, jars, bottles, or similar packages, their weight is to be considered in fixing the duty.

The concluding portion of the paragraph relates to mushrooms, cut, sliced, or dried, in undivided packages containing not less than 5 pounds. Clearly mushrooms are provided for in the first portion of the paragraph, and both the mushrooms and the coverings are dutiable thereunder unless the importation answers to all the conditions of

the latter part of the paragraph, namely, mushrooms, cut, sliced, or dried, and in undivided packages containing not less than 5 pounds.

The question is whether packages such as those in question are, within the meaning of this paragraph, undivided packages. We think it very clear that they are not. If it were more doubtful, the fact that the first part of the paragraph makes dutiable the immediate coverings would indicate that the words "undivided packages" relate to importations which do not contain other immediate coverings of the merchandise.

But the word "packages," as used to describe importations, has received a construction by this court in *United States v. Yamashita* (1 Ct. Cust. Appls., 341; T. D. 31435), which is inconsistent with the contention of the importer here. See also the case of *Keith v. State of Alabama* (91 Ala., 2).

It must be held that these packages, containing as they did numerous other immediate coverings, do not fall under the last part of the paragraph, but are definitely described in the first portion thereof, and that the decision of the Board of General Appraisers was correct.

Affirmed.

SHELDON & Co. v. UNITED STATES (No. 138). CUSIMANO v. UNITED STATES (No. 139). KLIPSTEIN & Co. v. UNITED STATES (No. 140). KRAEMER & FOSTER v. UNITED STATES (No. 141).¹

OLIVE OIL FOR MANUFACTURING OR MECHANICAL PURPOSES.

The result of chemical tests as here shown is inconclusive, and in view of the greater number and experience of the witnesses for the importers as to the appearance, taste, and smell of the oils, and further in view of the fact that the oils here were actually imported and sold as mechanical oils and for use as mechanical oils, the importation must be deemed olive oil for manufacturing or mechanical purposes, worth not more than 60 cents per gallon, and as such it was free of duty under paragraph 626, tariff act of 1897.—*Holbrook v. United States* (1 Ct. Cust. Appls., 263; T. D. 31317.)

United States Court of Customs Appeals, November 22, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 21336 (T. D. 29790).

[Reversed.]

Brown & Gerry for appellants.

William L. Wemple, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in these cases is olive oil, which was imported in various shipments to this country from Greece, Sicily, and Turkey under the tariff act of 1897. Paragraph 40 of that act laid a duty of 40 cents a gallon upon olive oil not specially provided

for. Paragraph 626 of the same act allowed free entry to olive oil for manufacturing or mechanical purposes, fit only for such use and valued at not more than 60 cents per gallon. The collector classified the importations now before the court under the paragraph first above named, and assessed duty upon them at the rate therein provided. The importers severally protested against this ruling, and contended that the importations fell within the second paragraph above stated, and were therefore entitled to entry free of duty.

It is conceded that the importations are olive oil; that the oil was valued at not more than 60 cents per gallon; that if the oil was for manufacturing or mechanical purposes and fit only for such use, it was free of duty; and that unless it was for manufacturing or mechanical purposes and fit only for such use, it was dutiable at 40 cents per gallon as assessed by the collector. The sole question, therefore, is whether or not the olive oil composing these importations was for manufacturing or mechanical purposes and fit only for such use.

It appears from the testimony that olive oils are used either for food or for manufacturing purposes. The latter class is generally called commercial or mechanical oil. The mechanical oil is used in making soaps and in other industries. The edible oil is manufactured with great care from the best fruit, whereas the mechanical oil is pressed from inferior or decayed olives, with little care for cleanliness, or is sometimes pressed from better olives after all the edible oil has been extracted from them. The edible oil is carefully handled and packed, whereas the mechanical oil is often handled locally in vessels of goatskin and is often transported in secondhand petroleum barrels. If the edible oil becomes so rancid as to be unfit for food, it may nevertheless be fit for mechanical use. However, all such mechanical oil is not simply rancid edible oil, for much of it is given the lower rating because it is naturally not bland and smooth, but possesses a rank and acrid taste and an unpleasant odor even when fresh. The olives grown in some districts are recognized as unfit for the production of edible oil, and the trade in such case ranks all the oil so produced there as mechanical oil. The class to which any given oil belongs is ascertained from its appearance, its taste, and smell. These proofs are also aided to some extent by chemical tests, but such tests are not conclusive. If such a test shows a high proportion of free fatty acid in the oil, it tends to show that the oil is not edible; if the free fatty acid is slight, it is more probable that the oil is edible. On the other hand, sometimes an oil is found with a relatively large measure of free fatty acid and is nevertheless undoubtedly edible; while, conversely, there are oils with little such acid that are palpably unfit for food. There are different grades both of edible and mechanical oils, and sometimes the better grades of the inferior oil approach very near in quality to the inferior grades of the better oil. Yet even in such cases experts are capable of distinguishing between the two by

sight, taste, and smell, aided by a knowledge of the province from which the oil comes; and witnesses say that there is rarely less than a difference of 20 cents a gallon in the price of inferior edible oils and superior mechanical oils.

The oils involved in this case, so far as appears, were packed in inferior barrels, being secondhand petroleum barrels, such as would not be used for edible oil. They were in fact bought, sold, and used as and for mechanical oil and that alone. The prices paid for the oil are consistent with this statement. Their value, as first above stated, also fell within the limit fixed by the paragraph as the maximum value of mechanical oil. In addition to this, numerous witnesses who qualify as experts and who gave the oils careful examination, testify that the oils in question were not edible, but were mechanical oils and fit only for such use.

In contradiction to this evidence the Government produced expert chemical testimony concerning the importations, showing a relatively small percentage of free fatty acids in most of them, supplementing this also by the testimony of the same witnesses concerning the appearance, taste, and smell of the oils. The contention of the Government is that the testimony taken together fails to show that the oils are fit only for manufacturing or mechanical purposes. The Government contends that even if the oils were actually used for mechanical purposes they were nevertheless not unfit for food purposes.

In view, however, of the inconclusiveness of the chemical tests, and in view of the greater number and experience of the importers' witnesses in so far as the testimony related to the appearance, taste, and smell of the oils, and in view of the fact that the oils were actually imported and sold as and for mechanical oils, it seems to be established that the oils fell within the class of manufacturing and mechanical oils created by paragraph 626 above referred to. It is true that some of the oils might possibly have been capable of use for food purposes, but such an use, while not an impossible one, would nevertheless have been a perverted and unfit use. The use and the only use for which the oils in question were really fit was the use to which they were actually applied—that is, for manufacturing and mechanical purposes.

The case of *Holbrook v. United States* (1 Ct. Cust. Appls., 263; T. D. 31317) is a case very similar to the one at bar in respect both to the issue and the testimony, and the reported decision in that case covers the entire subject with such fullness as to make a more extended discussion of this case unnecessary. Indeed, the present decision may be said to be a corollary of that in the case just cited in so far as that expression may properly apply to any ruling involving a review of testimony.

In the view above indicated the ruling below should have been for the appellants, and the decision against them is therefore *reversed*.

DE VRIES, Judge, did not sit in these cases.

DOWNING & Co. v. UNITED STATES (No. 188):¹

ADDITIONAL DUTY ON EXCESS GOODS, WHEN NOT ALLOWED.

An American concern with a London branch closed that branch and directed that such supplies as had been forwarded from this country and not consumed should be returned to the United States. Some goods of English manufacture were included in the consignment made up to be returned, but these last were not declared at the home port of entry, apparently through ignorance or mistake, for there is no imputation of fraud. The English goods were fairly to be treated as excess goods and not subject to an additional duty over and above that to which they would have been subject if regularly imported.—United States v. Leeming (153 Fed. Rep., 489), distinguished.

United States Court of Customs Appeals, November 22, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, G. A. 6957 (T. D. 30207).

[Reversed.]

Brown & Gerry for appellants.

D. Frank Lloyd, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The Franco-American Food Co., a corporation doing business in the United States, established a branch office in the city of London, England, and forwarded to the London establishment certain cooking utensils and, from time to time, advertising matter and office supplies of American origin. The company finally decided to close its London office and directed its agent in charge to return to the United States all supplies which had been received from the parent house and not consumed. By reason of this order the agent shipped to the United States 139 cases of goods. One hundred and thirty-five of these cases were covered by the sworn declaration of the shipper that they were of American origin, valued at £15, which declaration was accompanied by a "yellow certificate" from the American consul to the same effect. On arrival the importation was entered on the shipper's declaration and consular certificate, which constituted a special form of invoice used only for returned American goods. Having before them no documents other than the declaration, consular certificate, and bill of lading, the importers naturally described the importation in their entry as 139 cases of printed matter and cooking utensils of American origin, valued at £15. To the entry was attached the oath of the president of the company that all the articles were of American manufacture. After entry, 9 of the 139 cases were sent for examination to the public stores, where it was discovered that a part of the importation was of English, and not of American, origin. This brought about an investigation, as a result of which it was ascertained, with the aid of the Franco-American Co., that English goods, appraised at £25 10s. 9d., had been included in the shipment, and that the total value of the American goods shipped was £159. In accordance with reg-

¹ Reported in T. D. 32033 (21 Treas. Dec., 554).

ulations, the collector reported the case to the Treasury Department, which instructed him to lay the matter before the United States attorney, and if that officer was of the opinion that the presumption of fraud arising from the facts could be rebutted, to release the merchandise upon payment of additional duty. As, subsequent to these directions, the collector treated the excess importation as an honest mistake and did not seize the goods or proceed against the importer, as prescribed by law in cases of attempted fraud, it is evident that he was advised that the presumption of fraud could be rebutted. Following the instructions, he admitted the American goods free and assessed the goods of English origin not only for the usual duties, but for the additional duty prescribed for undervaluation by section 32 of the act of July 24, 1897, the material parts of which are as follows:

SEC. 32. * * * If the appraised value of any article of merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted, nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: *Provided further*, That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value.

The importer protested against the assessment of additional duties and claimed that the English merchandise should be treated as excess goods omitted from the invoice and as prescribed in articles 1045 and 1046 of the Customs Regulations, which are as follows:

ART. 1045. *Omission from invoice.*—If a package be found by the appraisers to contain any article not specified in the invoice, and they shall be of opinion that such article was omitted with fraudulent intent, the contents of the entire package will be liable to seizure and forfeiture. But when, in the opinion of the appraisers, no fraudulent intent is apparent, the value of the excess will be added to the entry and duties paid accordingly.

ART. 1046. *Excess of merchandise*.—Increased duty only is incurred by a simple excess of quantity over the quantity expressed in the invoice; but where the value of the goods as declared in the entry is less than the appraised value thereof, both increased and additional duties accrue upon the quantity of like goods found in excess of that specified in the entry.

The Board of General Appraisers was apparently of the opinion that the objection of the importers was well taken; but, considering that it was bound by the decision in *United States v. Leeming* (153 Fed. Rep., 489), the protest was overruled, and the importers appealed.

The decision in this case turns on the construction which should be given to section 7 of the act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897. In terms that section provides that "if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value *declared in the entry*, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty * * * but the additional duties shall only apply to the *particular article or articles in each invoice that are so undervalued.*"

It is admitted by the Government that the declaration of the shipper and the consular certificate thereto attached constituted the special invoice required for returned goods of American origin and that the entry of the importer was made thereon.

This case may be considered from the point of view, first, that the invoice, entry, and valuation of the goods presented by the importer to the collector covered by their terms only American goods and that therefore the British goods were not invoiced, entered, or valued at all by the importer; second, that the invoicing, entry, and valuation as American goods of what were really British goods was in effect the invoicing, entry, and valuation of British goods.

If the invoice, entry, and valuation of the goods covered only the American goods, then it appears to us clear that the imposition of additional duties can not be sustained. Under the language of the statute, to justify the imposition of additional duties, it would seem that there must be, first, a value declared in the entry; second, that that value must be applicable to some particular article set out in the invoice; and, third, that it must be below the appraised value. If no value for goods of English origin was declared in the entry and no English goods whatever were included in the invoice, it would seem that their subjection to additional duties was not authorized, especially as the law itself provides that additional duties shall apply only to the *particular article or articles in each invoice that are so undervalued*. As the American goods were not subject to any duty at all, additional duties could not of course attach to them, however much they might exceed either the entered or invoice value. On a literal interpretation of the statute and on the assumption that there was invoice, or valuation of British goods, we think it plain that goods must be considered merely as excess goods and not

subject to additional duties. The only question that remains to be considered is whether this court would be justified in giving to the provision under consideration a more comprehensive meaning than its language actually imports. Can we say that although the law-maker did not employ words apt to the purpose he truly intended that additional duties should be exacted on goods neither entered nor invoiced nor valued by the importer? We think not.

The language of the enactment appears to be clear, definite, and certain. Under such circumstances, to expand the provision and inject into it words not used by the legislator would not be warranted, and still less warranted, if that be possible, when it is considered that the additional duty clause is on its face a punitive measure. In certain contingencies, in order to give effect to the actual intent of the legislature, it is true that the language of a law may be broadened or restricted by the courts. So far as we are aware, it has never been held, however, that that power can be so exercised as to penalize an act or omission the punishable nature of which has not been formally and legislatively announced. On the theory that the invoice, entry, and valuation of American printed matter did not cover printed matter of British origin, the exaction of duties in addition to the usual duties would have to be sustained, if sustained at all, not because the importer undervalued an invoiced article, but because articles were imported which were neither entered, valued, nor invoiced. Failure to properly enter and invoice imported goods is not covered by section 32 but by other provisions of customs laws designed to meet just such cases and to prevent evasion of duties and frauds on the revenues which such a failure might facilitate. Section 9 of the act of June 10, 1890, provides for the case of a false entry based on a false invoice, and if the collector believed that a false entry based on a false invoice had been made within the meaning of that section he should have proceeded as therein directed. If he did not so regard it, there still remained section 2901 of the Revised Statutes which covered the situation exactly and defined precisely what should be done. This section reads as follows:

2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but, if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

If therefore in this case packages *were* found to contain articles not specified in the invoice, it became the duty of the appraisers to determine whether such articles were omitted with fraudulent intent. If they so determined, the contents of the entire package became liable to seizure. If, on the other hand, the appraisers were of the opinion that the omission was made without any intention of evading duties or defrauding the revenues, the excess became subject to the usual duties only and on payment thereof the importer was entitled to delivery of the importation.

If we consider the case from the second point of view and regard the printed matter of British origin as covered by the invoice, entry, and valuation of American printed matter, there seems to be no escape from the conclusion that such printed matter was more than covered by the valuation of £15 and was therefore not subject to the penalty for undervaluation.

From the customs records it appears that a list identifying by number each case to be shipped and specifying its contents was made out on September 16, 1908, by A. W. Randall, the shipper in London. On September 17, 1908, the list was presented to the consul general at London, who attached to it his yellow certificate, in which the merchandise was described as printed matter valued at £15, although the list clearly disclosed that the cases contained not only printed matter but cooking utensils and other articles as well. Four cases, marked 1a to 4a, which were actually shipped to the United States and entered, were not mentioned in Randall's list and were therefore not invoiced at all. These four cases and case No. 126 contained the following goods, which on investigation were found to be British and which were not referred to in any way in the invoice:

Articles.	Found in case No.—	Value.
		£ s. d.
Picture frames.....	126	2 12 0
39,000 order blanks.....	1a and 2a	7 6 3
4,500 addressed envelopes, printed.....	2a and 3a	1 13 9
2,000 unaddressed envelopes.....	3a	9 6
5,500 stock-on-hand sheets.....	3a	2 2 8
23,400 printed envelopes.....	4a	5 11 2
1,700 statements, printed matter.....	4a	1 5 6
82 index cards.....	4a	1 3
Total.....		21 2 1

The following were the goods which were invoiced as American goods, but which the investigation disclosed to be British goods:

Articles.	Found in case No.—	Value.
		£ s. d.
1,200 invoice envelopes.....	127	8 8
4,000 unstamped postcards.....	129	2 12 0
1,400 large envelopes.....	129	1 8 0
Total.....		4 8 8

From this it is evident that the only British goods which could be considered as invoiced were appraised by the appraiser at only £4 8s. 8d., which was more than covered by the £15 valuation, if that sum can be considered as a valuation of the British goods claimed to be invoiced. If it can not be considered as a valuation of British goods, then there was no valuation whatever of British goods made by the importer and therefore no undervaluation. It is true that the entry made by the importer on September 28, 1908, covered the full number of 139 cases and stated that the value thereof was £15, but it is equally true that that valuation of £15 can not be made to apply to any particular article or articles claimed to be undervalued. As additional duties are by the express terms of the statute applicable only "to the particular articles or articles in each invoice that was so undervalued," it seems evident that no additional duties should have been imposed.

The case of *United States v. Leeming* (153 Fed. Rep., 489), cited by the Government, dealt with excess goods identical with the goods actually entered, invoiced, and valued by the importer. The facts of that case substantially differed, therefore, from those of this appeal, and we must decline to accept it as decisive of the issue here, especially as we are not wholly in accord with its reasoning, although not at all prepared to say that the conclusion reached was incorrect.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* SHELDON & Co. (No. 310).¹

IMITATION JET GOODS NOT MANUFACTURES OF GLASS.

Technically "jet goods" are not, of course, imitation jet, but where the record discloses the importer, the collector, and the Board of General Appraisers all considered the importation an imitation jet it could not be properly assessed as jet, and was rightly held to be dutiable as imitation jet under paragraph 109, tariff act of 1909.—*United States v. Beierle* (1 Ct. Cust. Appls., 457; T. D. 31506).

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23464 (T. D. 30691).

[Affirmed.]

William K. Payne, Deputy Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* and *George J. Puckhafer*, of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers classifying an importation designated as jet bars, brooches, and earrings under paragraph 109 of the tariff act of 1909. The authorities relied upon by the board for this classification were G. A. 6995

¹ Reported in T. D. 32034 (21 Treas. Dec., 560).

(T. D. 30444) and G. A. 7119 (T. D. 30612), the latter being Beierle's case, which was, on appeal to this court, affirmed in T. D. 31506 (1 Ct. Cust. Appls., 457).

It is sought to differentiate the present case from Beierle's case, as it is said that the finding in the present case shows the articles to be jet and not imitation jet, as was the case in Beierle's protest.

The first inquiry is: In what sense is the word "jet" used in this record? Technically, it must be said that jet goods are not imitation jet goods, but if in the four corners of the record it is made evident that the collector, the importer, and the board all understood the goods to be and treated them as imitation jet, it would be manifestly unjust to now depart from this understanding and reverse the case and give the word a technical meaning as distinguished from a meaning which attaches to it in common use.

It needs no evidence to show that imitation-jet goods are often referred to as jet, and that the distinction is seldom nicely made in common speech. This record very clearly indicates that it was in the ordinary sense that the word "jet" was employed by all parties concerned in this importation. It is true they were entered as jet goods; but they were entered in connection with other goods which were admittedly imitation jet, and were, while designated the same as were these goods, returned by the collector as cut glass or as manufactures of glass.

The collector gives as his authority for classifying these goods Abstract 6822 (T. D. 26417) and Abstract 7181 (T. D. 26559).

In the first case the goods are referred to as jet ornaments, cut glass. The memorandum reads: "The merchandise consisted of jet ornaments with faceted surfaces produced by the process of cutting, and was held to have been properly classified as cut glass."

In Abstract 7181 (T. D. 26559) it is stated that the merchandise consisted of jet millinery ornaments, "which the board found to be composed of molded glass, cut glass, and metal, cut glass being the component material of chief value."

It is manifest by referring to these decisions that the collector intended to characterize these goods as falling within the description given in the abstracts referred to. Again, in the decisions cited by the Board of General Appraisers the articles in question were cut glass or imitation jet.

Furthermore, the invoice value of the goods in suit shows them to be worth but from 4 to 7 cents each, which is inconsistent with the well-understood rarity of real jet, and which leads to the inference that the merchandise was not, in fact, real jet.

We find, therefore, that the importer evidently did not intend to enter these goods as real jet; that the collector did not understand them to be real jet; and that the board in passing upon the importation did not understand that it was dealing with real jet. We are

irresistibly led to the conclusion that the article we are dealing with is imitation jet, and that the whole record read together clearly indicates this. This being so, the case is ruled by *United States v. Beierle, supra*.

The decision of the board is *affirmed*.

STROHMEYER & ARPE CO. v. UNITED STATES (No. 480).¹

1. A CHEMICAL COMPOUND.

A chemical compound is not simply a mingling of components, but a combination of them, resulting in their destruction as distinct entities and in the development by chemical reaction of a new substance possessing properties radically different from those of its constituent elements.

2. "MIXTURES."

Mixture implies that the corporeal integrity, the separate chemical nature, and individual properties of the mixed ingredients have been preserved.

3. LIME POWDER, A MIXTURE, NOT A CHEMICAL COMPOUND.

A combination of lime, carbonate of lime, and manganese oxide, for use in drying and hardening varnish, is a chemical mixture, and as such is dutiable under paragraph 3, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23840 (T. D. 30865).

[Affirmed.]

Brown & Gerry, for appellants.

Wm. L. Wemple, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of merchandise imported at the port of New York and assessed for duty by the collector of customs at 25 per cent ad valorem as a chemical mixture under the provisions of paragraph 3 of the tariff act of 1909, which reads as follows:

3. Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds, *mixtures*, and salts, and all greases, not specially provided for in this section, twenty-five per centum ad valorem; chemical compounds, mixtures and salts containing alcohol or in the preparation of which alcohol is used, and not specially provided for in this section, fifty-five cents per pound, but in no case shall any of the foregoing pay less than twenty-five per centum ad valorem.

The importers protested that the importation was not a chemical mixture, and among other grounds of protest, which it is unnecessary to discuss, set up the claim that the merchandise was dutiable under the provisions of paragraph 480, which reads as follows:

480. That there shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this section, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part not provided for in this section, a duty of twenty per centum ad valorem.

¹ Reported in T. D. 32036 (21 Treas. Dec., 562).

The Board of General Appraisers overruled the protest, and the importers appealed.

The deputy appraiser reported the merchandise to be a mixture of lime, carbonate of lime, and manganese oxide, used for the purpose of drying and hardening varnish. R. W. Moore, chemist in charge of the United States Appraiser's Laboratory at New York, testified on the part of the importer that the importation was a mixture of lime, carbonate of lime, and manganese oxide, mechanically and not chemically combined. Hermann Arpe, treasurer of the importing company, was of the opinion that the merchandise was made up of lime and a "manganate of lead." He was in accord, however, with the Government chemist, that the composition, whatever its components might be, was a mechanical mixture and not a chemical compound. The board found that the importation, which was invoiced as lime powder, consisted of a mixture of lime, carbonate of lime, and manganese dioxide. On the evidence presented by the record the only question to be determined by the appeal is whether a mechanical mixture of lime, carbonate of lime, and manganese oxide or dioxide is a chemical mixture within the meaning of paragraph 3 of the tariff act of 1909 as hereinbefore set out. Lime, as shown by the testimony, results from the chemical combination of calcium and oxygen, carbonate of lime from the chemical combination of lime and carbonic acid, and manganese oxide or dioxide from the chemical combination of manganese and oxygen. That these components of the merchandise are chemicals is not disputed. To make up the goods under discussion these chemicals were commingled in such a way as to preserve their individual properties and separate chemical nature, and admittedly such an association of materials constitutes not a chemical compound but a mechanical mixture. From this it would seem to follow that the resultant product was a mixture of chemicals, or, in short, a chemical mixture.

In this connection it should be remembered that a mingling of chemicals must result either in a chemical compound, destroying the identity of the original materials, or in a mere mixture in which the chemical individuality of the original materials is preserved. Scientifically speaking, mere mixtures of chemicals are known as mechanical mixtures. The scientific expression in a tariff law was open, however, to a construction which would include all classes of mixtures held together mechanically; and we think Congress deliberately made use of the designation "chemical mixtures" in order to manifest clearly its intention that the operation of paragraph 3, in so far as mixtures were concerned, was to extend to mixtures of chemicals and not to mixtures of other substances which were not chemicals. Counsel for the importers earnestly argue, however, that "chemical compounds" and "chemical mixtures" are virtually synonymous terms,

and that the addition of the latter phrase to paragraph 3 accomplished no extension of its provisions. To that proposition we are not willing to accede; first, because a chemical combination of constituent elements does not necessarily result from a mixture of chemicals, and, second, because it seems to be well settled by judicial decisions and by scientific usage that there is an essential difference between a mixture and a chemical compound.

As we have already observed, a chemical compound necessarily implies not a mere mingling of components but a chemical combination of them, resulting in their destruction as distinct entities and in the development by chemical reaction of a new substance possessing properties radically different from those of its constituent elements. *McKesson v. United States* (1 Ct. Cust. Appls., 213-216). On the other hand, in chemistry and mineralogy the term "mixture" carries with it the idea that the corporeal integrity of the ingredients has been preserved and that their incorporation has not lost to them their individual properties and separate chemical nature. (Webster's International Dictionary; Standard Dictionary; Century Dictionary.) This distinction between a mixture and a chemical compound is so well known and has been so frequently pointed out by the decisions that it is inconceivable that Congress should have so mistaken the meaning of the terms as to assume that they were equivalents and might be used interchangeably. *In re Auffmordt & Co.* (T. D. 11074); *Levi v. United States* (126 Fed. Rep., 420; T. D. 25050); *in re Isaacs, Vought & Co.* (T. D. 25410); *in re F. Behrend* (T. D. 25733); *in re F. R. Philipps & Sons* (T. D. 27051); *United States v. Proctor* (145 Fed. Rep., 126; T. D. 27115). The very fact that there is a difference between a mixture and a chemical compound and that disputes arose as to whether importations belonged to one category or the other was, we think, the cause which induced Congress to amend paragraph 3 of the tariff act of 1897 by making provision therein for chemical mixtures. We are of opinion that the amendment was not a purposeless bit of legislative redundancy, but was the result of a long experience which justified Congress in concluding that litigation would be best avoided by subjecting to the same rate of duty articles the true nature of which had been a frequent subject of controversy.

Counsel for the importers contend that the decision of the board is in conflict with the conclusions reached by it in T. D. 29922 on the protest of the same importers. In that case the board held, in July, 1909, that a mixture from which no chemical union resulted was not a chemical compound, and that therefore a mixture of lime, carbonate of lime, and manganese oxide, resulting in no combination of the constituents, was a mechanical mixture and not dutiable as a chemical compound under paragraph 3 of the act of 1897. As the law then stood the board was correct in so deciding, but whatever

weight that decision might have in determining the nature of the goods involved in this appeal, it can hardly be considered as adverse to their classification under paragraph 3 as subsequently amended by the tariff act of August 5, 1909. Counsel call attention also to T. D. 30223 and claim that the finding there made is in conflict with the meaning given by its decision in this case to the term "chemical mixtures." We think that the facts disclosed by the record in T. D. 30223 do not warrant that conclusion. The merchandise which the board was required to classify in that case was a mixture of 20 per cent Trinidad asphalt, 20 per cent California asphalt, 12 per cent liquid asphalt, 6 per cent ammonia, and the balance water. None of these substances, with the exception of ammonia, could well be designated as a chemical, and hence the composition could not be regarded as a mixture of chemicals.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, did not sit in this case.

VAN TREESE *v.* UNITED STATES (No. 484).¹

WHERE NO ACTUAL TENDER OF ENTRY WAS MADE.

It is unnecessary to determine whether the absence of an inspector would validate on a later day a tender of entry made during the inspector's absence, it appearing here no actual tender of entry was made of certain horses it was desired to import on August 5, 1909, and that the tender of entry was made in fact on August 6, 1909. The horses were rightly held dutiable as of that date under the act in force that day.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 23890 (T. D. 30879).

[Affirmed.]

Richardson & Doan for appellant.

Wm. K. Payne, Deputy Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

It appears in this case that eight horses were brought into the United States from Mexico through the port of Douglas, Ariz., on August 6, 1909, and that a duty of \$30 a head was assessed thereon under paragraph 227 of the tariff act of 1909. The protest sets forth that the horses were of American origin, and would have been entitled to free entry under the act of 1897; that the importer had the horses at the international line and was ready to make entry thereof on August 5, when the terms of the act of 1897 would have been applicable, but was unable to do so by reason of the absence of the sanitary inspector of the Bureau of Animal Industry, who was engaged in making inspections elsewhere. The importer claimed that it was through no fault of his that the importation was not made on August 5, when the

¹ Reported in T. D. 32036 (21 *Treas. Dec.*, 565).

horses could have been returned free of duty, and claims the right to be relieved from the payment of duty imposed under the act of 1909.

The Board of General Appraisers held that it might well be conceded that the animals could not have been brought into the United States before having been examined by a Government inspector, yet that the importer, in order to place himself in a position to claim the right of entry, should have at least tendered an entry, and the board found that there was nothing in the record to show that a tender of entry was made, and that the absence of the inspector would not prevent the importer from making tender, thus placing himself in position to demand the rights of an entry under the previous law.

The importer's claim is stated in the petition for appeal to this court in the following language:

I claim the importer could not tender an entry on August 5, as the United States veterinary was not available for the preliminary inspection of the animals, which were being held on Mexican territory on account of entrance being refused, as no certificate of health could be had.

The importer has apparently since shifted his ground, as it is said in the brief of counsel that the record must unquestionably show that the acting deputy collector refused entry on the 5th of August, 1909, and that a refusal could not have been made by him unless there had been an offer of a tender of the animals. It would appear that the record could not have been before counsel who prepared the brief or else erroneous inferences from the facts appearing in the record have been drawn. It is said in his brief:

It further appears from the letter of the collector at Nogales * * * that the horses in question were at the international line and ready to be entered on August 5, 1909.

This is a misconstruction of what the report of the collector really was. In the letter submitting the protest, the collector said:

The principal contention of Mr. Van Treese is that the horses in question were at the international line and ready to be entered on August 5, 1909, the day before the new tariff act went into effect, and that he was prevented from entering them on that day by the absence of the sanitary inspector of the Bureau of Animal Industry, who was engaged in making inspections elsewhere.

The brief again states that the decision of the Board of General Appraisers shows the fact to be that the importers had the horses at the international line and ready and anxious to make entry thereof on August 5, 1909. What the board really stated in the opinion was that—

Objection to the payment of this duty is made for the reason, as set forth in the protest, * * * that the importer had the horses at the international line, and was ready and anxious to make entry thereof on August 5.

Counsel for the importer further says:

The protest, which is not controverted, shows not only that the animals were there but that they were refused entrance because no certificate of health could be had.

Counsel for the Government do controvert the allegations of the protest. It is contended on behalf of the Government that it was incumbent on the importer not only to assert his claim in his protest, but to overcome the presumption in favor of the correctness of the collector's decision by actual proof of the facts asserted.

It will be seen that no evidence or allegations of an entry on August 5 or of tender thereof appears.

Section 29 of the act of 1909 provides that—

On and after the day when this act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, * * * shall be subjected to the duties imposed by this act and to no other duty, upon the entry * * * thereof.

We need not determine whether absence of the inspector would have afforded sufficient ground for accepting an inspection at a later date had entry been tendered on the 5th, as the record does not present this question. The case is one of apparent hardship, but we see no way open to relieve the importer.

Decision *affirmed*.

GOODMAN & Co. *et al.* v. UNITED STATES (No. 525).¹

MANUFACTURED FEATHER ARTICLES, WINGS, POMPONS, ETC.

In a decision of these cases at a former term it was stated the importation might be appropriately described as either quills or feathers. It was there attempted to make plain, by exhibiting the previous history of the pertinent clauses of the law and by contrasting the use of certain words employed in paragraphs 438 and 469 of the tariff act of 1909, what seemed to the court must have been the intention in that particular enactment. The conclusion there stated was reached after an examination and full consideration of the pertinent authorities, and is now adhered to.

United States Court of Customs Appeals, November 22, 1911.

APPLICATION for a rehearing (T. D. 31658).

[Denied.]

Joseph G. Kammerlohr and *John Giblon Duffy* for the motion.

Wm. K. Payne, Deputy Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case was decided May 29, 1911, and is found reported in T. D. 31658. A motion for a rehearing has been filed, in which the case is reargued, and considerable space is devoted to establishing the contention that the word "quills" is appropriately used to designate the wing and tail feathers of a bird. This fact, however, was fully recognized in the opinion. It was said: "It is established, not only by the testimony but by the lexicographers, that the tail and wing feathers of a bird are appropriately described as quills." But it was also held that the complete tail and wing feathers of a bird are

¹ Reported in T. D. 32037 (21 Treas. Dec., 567).

also appropriately described as feathers, and it was recognized therefore that the question of classification of these goods was one of some difficulty. Based in large part upon the correlation of the word "quills" in paragraph 463 to other products of similar character with the horny substance of the quills, we were of the opinion that the word "quills" in that section was used to describe the horny substance of the quill, and that as these articles were likewise dutiable as feathers, they should be held dutiable under paragraph 438, as had been determined by the Board of General Appraisers.

It was said in the course of the opinion that the wing and tail feathers of certain birds have been held dutiable as feathers, citing the two cases of G. A. 1428 (T. D. 12832) and G. A. 1470 (T. D. 12919). It is suggested in the brief of counsel that the statement in the brief of Government's counsel presented at the hearing misled the court. This statement appears to be based upon the fact that the citation of G. A. 1428 (T. D. 12832) was in our main opinion cited as G. A. 1328, following an error in the brief of Government's counsel. The implication is that the court accepted the brief of counsel and made no examination of the cases in question. It is due to the court, however, to say that the cases were fully examined before the opinion was written, and that the error in citation must have been perpetuated by dictating from the brief of counsel when the opinion was prepared.

Counsel are also mistaken in assuming that we deemed these cases as authority for anything beyond the fact that the word "feathers" was in each of the cases recognized as an appropriate term to describe the wing and tail feathers of a bird, or that it was believed that the board was then dealing with provisions contrasting the word "quills" with the word "feathers." The only reason for citing these decisions was to show that there had been a judicial recognition of the fact that the wing and tail feathers of birds were appropriately described as feathers. The opinion recognizes throughout that the word "quills" is equally appropriate for describing such feathers. The decision, as we sought to make plain, rests upon a contrast of the two provisions, based upon the correlation of the terms and the previous history. It was said:

In the present case it is to be noted that the words interpreted by the decision of the court in *United States v. Stearns*, *supra*, were "quills, prepared." In the present act the legislation relates to "manufactures of quills," and from the connection in which the word is employed it might well relate to quills in a different sense. Paragraph 463 deals with "bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component material of chief value, not specially provided for in this section." There is nothing provided for in this section which suggests manufactures to be used as articles of millinery or in the making up of hats or bonnets, whereas under paragraph 438 the articles there provided for are those used in making and ornamenting millinery, such as hats and the like. We think the intent of Congress was to include in paragraph 438 all articles of this class, and that as the language employed by the added portion of the section is appropriate for this purpose, it should be given that construction.

The application for a rehearing is *denied*.

UNITED STATES *v.* CORSI, ZUMSTEG & Co. (No. 632).¹

LACTARENE FREE OF DUTY.

A gritty, yellowish powder, with the trade name of "plasmon," but invoiced as lactarene, and known to the trade as lactarene, casein, or milk albumen, is not milk, preserved. The importation was free of duty as lactarene under paragraph 594, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24896 (T. D. 31335).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Walden & Webster (*Howard T. Walden* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The merchandise involved in this appeal was classified as "milk, preserved," and assessed for duty by the collector of customs at the port of New York at 2 cents per pound under the provisions of paragraph 239 of the tariff act of July 24, 1897, which paragraph reads as follows:

239. Milk, preserved or condensed, or sterilized by heating or other processes, including weight of immediate coverings, two cents per pound; sugar of milk, five cents per pound.

The importers protested that the importation was not preserved milk and set up the claim that the article assessed for duty was entitled to free entry as "lactarene" under the provisions of section 2 and paragraph 594 of the act above mentioned, which section and paragraph are as follows:

Sec. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty:

594. Lactarene.

The Board of General Appraisers sustained the protest and the Government appealed.

The merchandise in controversy is a gritty, yellowish powder, to which the trade-mark name of "plasmon" has been given by the Plasmon Co., for which it is imported. This designation seems to be a purely fanciful one, which, for advertising purposes and to distinguish the goods from those of rival concerns, has been substituted for the ordinary names by which the product in question is commonly known.

The testimony on behalf of the importers is to the effect that although the article is sold as plasmon to the customers of the Plasmon Co., it comes to this country from the manufacturer marked

¹ Reported in T. D. 32038 (21 Treas. Dec., 569).

as "lactarene," and that it is known to the trade either as lactarene, casein, or milk albumen. On the part of the Government Wilton G. Berry, a chemist in the laboratory of the appraiser's office at the port of New York, testified that the merchandise as shown by a chemical analysis was a "soluble casein compound;" that is, a casein made soluble in water by the addition of soda or potash.

This is all the record evidence as to the nature and character of the imported merchandise, and if it stood alone we should have some hesitation in deciding that it established anything more than that the disputed product was casein, an article which is not milk, but one of the constituents of milk. The finding of the board that lactarene is but another name for casein is well supported, however, by other facts of which we think judicial notice may be taken, and we are of opinion that the decision reached by that tribunal should not be disturbed. See 16 Cyc. L. & P., 851; *Graham v. Williams* (21 La. Ann., 594, 597); *Hatch v. Dunn* (11 Tex., 708, 715); *United States v. Teschmaker* (22 How., 392, 403).

It is a matter of industrial history that some 60 years ago a Scotchman named Pattison discovered a new material for the fixing of colors on woven fabrics and patented the process for making it. This material was produced by treating buttermilk or skimmed milk with acids, and to the article thus evolved Pattison gave the name of "lactarine." *In re Hutchinson* (T. D. 27645); *United States v. Brownell* (159 Fed. Rep., 219).

Originally the term "lactarene" had no higher sanction than has the trade-mark designation "plasmon," but as time passed and Pattison's invention came into use that which was once a mere name seems to have acquired by popular usage a definite place in the English language and a meaning synonymous with that of "casein." Lactarene is variously defined as follows:

(1) A yellowish, granular, pulverulent *casein* or curd of milk, prepared by precipitating skimmed milk with dilute acids, and used as a mordant in calico-printing. (Standard Dictionary.)

(2) The commercial name for a preparation of the casein of milk used by calico printers like albumen. (Century Dictionary.)

(3) A preparation of casein from milk used in printing calico. (Webster's International Dictionary.)

(4) Lactarene. The casein of milk is commercially prepared by being freed from fat, precipitated by an acid, thoroughly purified, dried, and powdered. It is insoluble in water, but is soluble in an alkali, such as ammonia, and in this form is used, like albumen, for fixing pigment colors in calico printing. The cloth, after it has been printed, is steamed, the ammonia is driven off, and the pigment is thereafter able to resist the action of water. (The Americana.)

When to these definitions of lactarene is added the consideration that to produce casein milk is subjected to practically the same treatment as that employed by Pattison to obtain lactarene, it is not unreasonable to conclude that the terms "lactarene" and "casein" are

really designative of the same substance. (See definitions of casein in the Century Dictionary; Standard Dictionary; New International Encyclopedia; Watts' Dictionary of Chemistry, p. 334; Commercial Organic Analysis, Allen, Vol. IV, pp. 88-90.)

That "lactarene" and "casein" are really verbal equivalents, and that "lactarene" is in truth nothing more than the lay designation for the substance known to science as "casein," is confirmed by the fact that those terms are so regarded in technical works and by scientific authors dealing with mordants and with the constituents and derivatives of milk.

Wagner's Chemical Technology, page 792, referring to the uses of casein, says:

Casein is also used in calico printing as a mordant under the name of lactarene.

Sadtler's Industrial Organic Chemistry, dealing with the uses of casein, discusses the subject, at page 264, as follows:

Casein is now used on a large scale, first, as a basis of food preparations; second, as a fixing agent in calico printing instead of albumen; and third, as a substitute for glue in cements. For the first class of compounds, the casein salts of the alkalies and alkaline earths are used, and are obtained by dissolving casein in the calculated amount of caustic alkali, alkali metal, carbonate or phosphate or milk of lime, and evaporating the solution *in vacuo*. The products are dry, white powders. For the second class of compounds, casein is generally dissolved in ammonia, the solution evaporated, and the residue mixed with milk of lime. *Lactarene* is a commercial preparation of this class, used as a fixing agent.

Crookes' Handbook of Dyeing and Calico Printing, pages 78-79, treating of mordants, says:

Under the name of lactarine, casein is employed as a mordant for fixing pigment colors; for instance, ultramarine. Under certain conditions the results are moderately good, but great care and attention are required. Lactarine is insoluble before use and has to be dissolved in an alkaline liquid, such as ammonia or borax. The colors prepared with lactarine are liable to decomposition, and a color that may have worked well in the morning, in the afternoon has been known to have changed either into a solid mass or a curdy conglomerate totally unfit for printing, and not reconvertible into good color again by any means.

At page 185 the same book says:

In printing, magenta is applied to calico with albumen, and thickened with starch or gum. "Lactarine" (casein) may also be used instead of albumen when no additional thickening is needed. In either case the goods after printing are steamed from 30 to 60 minutes.

The Printing of Cotton Fabrics, by Antonio Sansone, page 171, refers in the following terms to the employment of casein in calico printing:

Casein or lactarine is not largely employed in calico printing for the fixture of pigments, in the same way as albumen, as it does not yield such fast colours. It possesses the same elementary composition as albumen, but is far from possessing the same fixing properties. The commercial article, which is in the form of a yellowish white powder, is obtained from skimmed milk by precipitation with weak acids, then filtering, washing until free from acid, and drying.

Casein, Its Preparation and Technical Utilization, by Robert Scherer, Ed. 1906, pages 25-26, speaking of the method of separating casein from milk, says:

By this means 100 parts of skim milk will yield about $8\frac{1}{2}$ parts of damp and $3\frac{1}{2}$ parts of dry casein. This is put on the market as "technical casein" or "lactarin." It is soluble in alkalies, but insoluble in water unless the latter receives an addition of 10 per cent of some alkali (*e. g.*, soda, borax, or ammonia). Dry casein still contains about 10 per cent of moisture, which constitutes one of the factors determining the quality of the product, though less important than the appearance and smell. The latter must on no account be ammoniacal, but recall that of fresh milk, and the color must be pure white. The purer the color and the more agreeable the smell, the higher the value.

In Spon's Encyclopedia, at page 1304, criticizing the use of the term "lactarine," it is remarked that:

It is to be regretted that, in an English patent for the use of casein as a mordant, it received the utterly needless and unscientific name of "lactarine," to which the trade still cling.

The Government insists, however, that under the evidence the importation is not casein, but a casein compound designed for use as a food and not as a mordant and that therefore it can not be admitted free as lactarene even if that term be accepted as another name for casein. In this contention there would be much merit if the facts were such as to justify the conclusion that the merchandise under discussion is not casein, but something else. Unfortunately for the Government's argument in that behalf the assumption of facts upon which it is based is warranted neither by the record nor by matters outside of the record of which judicial notice may be taken. Berry, the Government chemist, did testify that the article imported was a soluble casein compound—a compound of casein and soda or potash, but neither from the testimony of the witnesses nor from the official analysis does it appear that there was any combination between the casein and the soda or potash, and so far as the record discloses the alkalies mentioned may have rendered the casein soluble by taking up the fats and oils surrounding it or in some other purely mechanical way. Moreover, it is fairly evident from Berry's testimony, taken as a whole, that it was not his intention to convey the idea that casein had been so combined with soda or potash as to lose its chemical identity as casein and to become some other article. Indeed, he makes it clear that the addition of soda or potash to the casein is for the purpose of making the latter soluble and that by "soluble casein compound" he means no more than "a sort of casein soluble in water."

The suggestion that the importation is a food product and that lactarene is unfit for human consumption finds no support either in the evidence or in the process for making lactarene as described by Pattison. As a matter of fact Pattison did not discover a new

material, but a new use for a very old material. The curdling of milk with acids is almost as ancient as cheese making, and Pattison simply found out that the curd of milk, a very common foodstuff, might be made to serve a useful industrial purpose as a mordant. To produce lactarene Pattison's patent did not require the use of a poisonous acid, and if it did there is nothing in the case to sustain the deduction that the curd of milk produced by a poisonous acid would be any less casein than the curd of milk produced by an acid as harmless as vinegar.

We think the finding of the board that the merchandise in question is casein is sustained by the evidence and that popular usage has given to the term "lactarene" a signification which makes it synonymous with "casein."

The decision of the Board of General Appraisers is therefore *affirmed*.

DE VRIES, Judge. did not sit in this case.

IRWIN & Co. v. UNITED STATES (No. 638).¹

1. CONSTRUCTION.

According to the strict rules of grammatical and legal construction and in the absence of restraining considerations, a modifying clause following a number of recitals applies to its immediate antecedent and not to all those antecedents; but,

2. ERASERS OF METAL WITH FIXED BLADES.

The legislative history of paragraph 152, tariff act of 1909, seems to show that the additional provision inserted therein, the basis of contention here, was intended to enlarge the class, make it more comprehensive, not less so; and erasers of metal with fixed or rigid blades set into handles of wood or other material are dutiable under that paragraph.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7165 (T. D. 31294).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel), for appellants.

Wm. K. Payne, Deputy Assistant Attorney General (Martin T. Baldwin on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of metal erasers, which are well-known articles for desk use, falling in a general way under the head of stationery supplies. They are composed of fixed or rigid metal blades set into handles of wood or other material.

The importation was entered under the tariff act of 1909, and the collector classified the articles as "erasers," under paragraph 152 of that act, and assessed the duty accordingly.

¹ Reported in T. D. 32039 (21 Treas. Dec., 573).

The importers protested against this classification and contended that the erasers in question did not come within the terms of that paragraph, because they had fixed blades, whereas the paragraph, the importers contend, includes only such erasers as have folding blades.

This protest was duly heard upon evidence by the Board of General Appraisers, and the same was overruled. The appellants excepted to the board's decision and now pray for a reversal thereof.

It appears at once, therefore, that the issue made by the parties is very distinct and clearly defined. It is this: Does paragraph 152 of the act of 1909 include within its purview such erasers as have fixed blades or only such as have folding blades? The appellants contend that only erasers having folding blades are covered by the paragraph. The appellee maintains that the paragraph includes erasers having either folding or fixed blades.

The pertinent part of the paragraph reads as follows:

152. Penknives, pocketknives, clasp knives, pruning knives, budding knives, erasers, manicure knives, and all knives by whatever name known, including such as are denominatively mentioned in this section, which have folding or other than fixed blades or attachments, valued at not more than forty cents per dozen, forty per centum ad valorem. * * *

It will be seen that the decision of the present question depends upon the scope and application to be given to the clause "which have folding or other than fixed blades or attachments," above appearing. If that clause modifies only its next preceding antecedent, then the contention of the appellee should be sustained; if, on the other hand, it modifies all the terms preceding it in the paragraph, then the exception of the appellants should be sustained.

According to the strict rules of grammatical and legal construction, and in the absence of restraining considerations, such a modifying clause following a number of recitals applies only to its immediate antecedent and not to all those which precede it. Such a rule is, however, only the beginning of a real inquiry into the subject, because, manifestly, it must yield if other and controlling reasons appear to the contrary.

In order to investigate the subject more fully, it is well to refer first to the corresponding paragraph of the act of 1897, being paragraph 153 of that act. It will be seen that the later paragraph assumes the appearance of an amendment of the earlier one rather than that of an entirely new and original enactment.

Paragraph 153 of the act of 1897 reads in part as follows:

153. Penknives or pocketknives, clasp knives, pruning knives, and budding knives of all kinds, or parts thereof, and erasers or manicure knives, or parts thereof, wholly or partly manufactured, valued at not more than forty cents per dozen, forty per centum ad valorem. * * *

It thus appears that the earlier paragraph contained in the same order all of the knives which are specifically named in the later one, and this in comprehensive and unqualified terms; and that under the earlier provision all erasers were included within the same classification, those having fixed blades as well as those having folding blades. If appellants' view is adopted, the later enactment has the effect of taking out of that classification all knives and erasers of the kinds therein named which have fixed blades, leaving the paragraph to apply only to those having folding blades. This would effect a radical change in the subject matter, for it appears from the testimony that almost all erasers have fixed blades; and common knowledge is to the effect that many pruning knives and budding knives have the same; and this is also in some measure true of manicure knives. Therefore, if appellants' construction obtains, the later paragraph has withdrawn from the earlier classification about all erasers and many pruning, budding, and manicure knives, and has made no other specific provision for any of the substantial classes thus withdrawn.

This result militates strongly against the contention of appellants because there is nothing in the legislative history of the enactment which indicates such a purpose. The more reasonable view therefore seems to be that the later paragraph was intended to cover in the same measure as the earlier one all those articles which are specifically named in both; and that the additional provision in the later one containing the clause in question was not intended to limit the class already created by the first paragraph, but was intended only to enlarge it and make it more comprehensive. The meaning is that the prescribed duty shall be assessed not only upon all penknives, pocketknives, clasp knives, pruning knives, budding knives, erasers, and manicure knives, as had been also provided by the act of 1897, but in addition thereto upon a residuary class, namely, all knives by whatever name known, including such as are denominatively mentioned in the section, which have folding or other than fixed blades or attachments. The limiting clause therefore applies only to the added class of knives, which class and limitation came into the paragraph together, and not to those already specifically and unqualifiedly mentioned in the paragraph. The clause "including such as are denominatively mentioned in this section" refers to the kinds of knives named in paragraph 154 of the present act. That paragraph provides in terms for "table, butchers', carving, cooks', hunting, kitchen, bread, butter, vegetable, fruit, cheese, carpenters' bench, curriers', drawing, farriers', fleshing, hay, tanners', plumbers', painters', palette, artists', and shoe knives." These knives almost all have fixed or rigid blades, yet in some few cases they have folding blades. The case of *United States v. Borgfeldt*, (1 Ct. Cust. Appls., 255), relates to one of the few instances of such

knives with folding blades. The construction contended for by the appellee has the effect only of taking from the above classification any knives having folding blades and adding such to the class established by paragraph 152, thus leaving paragraph 154 inclusive only of knives with fixed blades. This interpretation is the reasonable one, and the decision of the board following it is *affirmed*.

ILLFELDER & Co. *et al.* *v.* UNITED STATES (No. 640).¹

LACQUERED METAL BOXES, WITH COMPARTMENTS AND HINGED LIDS, CONTAINING PAINTS.

Subsection 18 of section 28, tariff act of 1909, makes provision, it is true, for a duty on containers, but paragraph 195 of that act carries a specific provision for certain sorts of containers, and the merchandise here falls directly within that specific provision; lacquered metal boxes, with compartments and hinged lids, containing paints, though the lids be used as palettes, are dutiable under that paragraph (195).

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24807 (T. D. 31300).

[Affirmed.]

Brown & Gerry, for appellants.

Wm. K. Payne, Deputy Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of shallow lacquered metal boxes, with hinged lids. The interior of each box is subdivided into separate spaces or compartments by ridges which are stamped into the metal. The boxes are used as containers for water-color paints in the form of small cakes and in tubes, and also for paint-brushes, all of which are fitted into the several compartments just mentioned. The merchandise entered under the act of 1909, and when imported the boxes were filled with the paints and paint-brushes for which they were adapted.

The collector assessed the paints contained in the packages at 30 per cent ad valorem under paragraph 56 of the act, and no objection was made to this ruling.

The boxes were at the same time classified under paragraph 195 as metal lacquered, and were assessed with duty at 4 cents per pound and 35 per cent ad valorem. To this ruling the importers filed their protest, claiming that the boxes were not separately dutiable within the meaning of paragraph 195, but were properly subject to ad valorem duty as part of the value of their contents, in accordance

¹ Reported in T. D. 32040 (21 Treas. Dec., 576).

with subsection 18 of section 28, as the usual coverings or containers of merchandise dutiable at an ad valorem rate.

This protest was duly heard by the Board of General Appraisers and was overruled. The appellants now pray for a reversal of this decision.

The following is a copy of the pertinent part of paragraph 195, under which the articles were assessed, and also of subsection 18 of paragraph 28, under which appellants claim assessment:

195. Cans, boxes, packages, and other containers of all kinds (except such as are hermetically sealed by soldering or otherwise), composed wholly or in chief value of metal lacquered or printed by any process of lithography whatever, if filled or unfilled, and whether their contents be dutiable or free, four cents per pound and thirty-five per centum ad valorem. * * *

SEC. 28 (subsection 18). That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; * * * including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demijohns, carboys, and other containers or coverings, whether holding liquids or solids, * * * and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. * * *

Under the foregoing paragraphs a general provision for containers of ad valorem importations is made by the terms of subsection 18, whereas by the more specific terms of paragraph 195 a certain kind of containers is withdrawn from the general classification and subjected to a separate rate of duty. The special class thus created consists of "cans, boxes, packages, and other containers of all kinds, * * * composed wholly or in chief value of metal lacquered, * * * if filled or unfilled, and whether their contents be dutiable or free." The description of the articles in question as given above seems of itself effective to place them within the terms of this special classification. They are certainly cans, boxes, packages, or other containers, and they are concededly composed of lacquered metal.

These facts seem to bring them directly and unmistakably within the classification of paragraph 195.

However, it is contended by appellants that these articles are more than mere containers, that they are also palettes, and that they can not therefore be properly classified under paragraph 195, which, they maintain, is intended to include only such containers as are coverings alone and serve no additional purpose in relation to their contents. It is true that the metal lids of the boxes in question are made in concave compartments and that these may be used, and doubtless are commonly used, as bowls within which the colors may

be mixed or the paints placed while the articles are in use. And it is also true that the boxes and contents are obviously designed to be thus used together until the paints are fully consumed. These facts, however, do not imply that the coverings in question are any the less containers of their contents within the meaning of paragraph 195. The use of the lids as palettes is incidental only and does not change the character of the article as essentially a container for the paints and brushes.

By the terms of paragraph 195 such articles are expressly made dutiable at the same rate whether they be filled or unfilled, and whether their contents be dutiable or free. This is the paragraph therefore which would control the articles if they entered unfilled or filled with undutiable contents, and the provisions of the paragraph expressly determine that even if filled with dutiable contents they shall nevertheless fall within the separate classification.

In support of this view it may be noted that appellants themselves indeed contend that the articles in question are the usual containers of the paints and brushes which are their contents, and that this statement is contained in their original protest. Their contention is that the articles should be assessed *ad valorem* as part of the value of their contents under that provision of subsection 18 which provides for such assessment upon the usual containers of *ad valorem* merchandise. That subsection furthermore provides, as appears above, that if there be used for covering or holding imported merchandise any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied upon such article at the rate at which the same would be subjected if separately imported. The appellants maintain that the articles in question do not come within this latter provision for unusual containers, because, they maintain, these coverings are not unusual, but to the contrary are the usual containers for their contents.

The claim of the appellants on the one hand therefore is that the articles in question are not containers within the meaning of that word as used in paragraph 195, because of their added character as palettes, but on the other hand that they are containers within the meaning of the same word as used in subsection 18, notwithstanding their added character as palettes; and, furthermore, that they are even usual containers in contradistinction to unusual ones, such as are separately provided for in the subsection.

This leads to an involved construction, which does not seem to be consistent with the plain language of the enactment.

In this view of the case the decision of the board is approved and *affirmed*.

DE VRIES, Judge, did not sit in this case.

KUPFER BROS. v. UNITED STATES (No. 641).¹

1. ADMINISTRATIVE CONSTRUCTION.

It is a well-established rule that where statutory language has been given a long-continued administrative construction, and there is a reenactment of the statute in substantially the same language, it is presumed the administrative construction was adopted.

2. PAPER, PLAIN OR SURFACED, AND METAL COATED.

Reviewing the history of the relevant clause in tariff act of 1909 and the construction given to the previous acts, paper, whether plain or surfaced to be coated, metal coated, is found to be dutiable under paragraph 411 of that act as "papers with coated surface or surfaces * * * if wholly or partly covered with metal or its substitutes" at 5 cents per pound and 20 per cent ad valorem.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7169 (T. D. 31298).

[Affirmed.]

Brown & Gerry and Comstock & Washburn for appellants.

Wm. L. Wemple, Assistant Attorney General (*Martin T. Baldwin* on the brief) for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question consists of plain paper which has been coated with metal. A portion of the paper is produced by applying a metal wash to a plain paper. The remainder is produced by pasting metal leaf upon a plain paper, with a subcoating applied for the purpose of causing adhesion of the metal when put on. No other distinction need be pointed out between the two classes of paper, as in the view we take of the case both are alike dutiable as assessed.

The importation was assessed as paper coated with metal at 5 cents per pound and 20 per cent ad valorem under paragraph 411 of the tariff act of 1909. The pertinent provisions of this paragraph are as follows:

411. Papers with coated surface or surfaces, not specially provided for in this section, five cents per pound; if wholly or partly covered with metal or its solutions (except as hereinafter provided), or with gelatin or flock, or if embossed or printed, five cents per pound and twenty per centum ad valorem; papers, including wrapping paper, with the surface decorated or covered with a design, fancy effect, pattern or character, whether produced in the pulp or otherwise, but not by lithographic process, four and one-half cents per pound; if embossed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, five cents per pound and twenty per centum ad valorem: *Provided*, That paper wholly or partly covered with metal or its solutions, and weighing less than fifteen pounds per ream of four hundred and eighty sheets, on a basis of twenty by twenty-five inches, shall pay a duty of five cents per pound and twenty-five per centum ad valorem. * * *

¹ Reported in T. D. 32041 (21 Treas. Dec., 579).

The contention of the importer is that the words "if wholly or partly covered with metal or its solutions," which appear in the second clause of the paragraph quoted, are to be referred to the preceding words "paper with coated surface or surfaces," and that unless the paper has been given a previous coating the fact that it is coated with metal does not bring it within the terms of this second clause. In other words, that to make metal-coated paper dutiable under this clause it must appear that the metal coating is imposed upon a previously surface-coated paper.

The Government, on the other hand, contends that the qualifying words "if partly or wholly covered with metal or its solutions" apply to all papers, and that it is sufficient to show that the paper is covered with metal or its solutions.

The history of this provision is as follows: Paragraph 420 of the tariff act of 1890 imposed a duty of 35 per cent ad valorem on papers known commercially as surface-coated papers and manufactures thereof. This paragraph was interpreted by the Board of General Appraisers as including paper whose coating consisted of metal or of metal leaf. In the matter of Louis Dejonge & Co., G. A. 1125 (T. D. 12353), and in the matter of L. Heller & Co., G. A. 1389 (T. D. 12793).

In 1894 the provision was embodied in paragraph 308 and covered surface-coated papers and manufactures thereof.

In the matter of the protest of the Graham Paper Co., G. A., 4025 (T. D. 18627), the Board of General Appraisers held that a paper coated with a composition called "argentine," consisting of tin, lead, and other metals, fell within this paragraph.

In the act of 1897, paragraph 398 read as follows:

Surface-coated papers not specially provided for in this act, two and one-half cents per pound and fifteen per centum ad valorem; if printed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, three cents per pound and twenty per centum ad valorem. * * *

This paragraph, it will be noted, introduced the higher rate of duty on metal-coated paper. Under this statute, papers like those here involved were by the Treasury Department in actual practice treated as metal-coated papers and assessed for the higher rate of duty, and this practice continued during the entire period that the tariff act of 1897 was in force, and no distinction was made because of the presence or absence of a coating placed upon the paper before the metal was applied. No question of the validity of assessments under this paragraph was ever raised before the board, so far as we have been able to ascertain, and in the opinion of the board in the present case it is suggested that the contention now raised by the importers was never seriously urged under the life of the old act.

The present act of 1909 is not essentially different from that of 1897.

It is said by the importer:

The second clause of paragraph 411 specifies four separate qualifications:

1. Metal coated.
2. Gelatin or flock coated.
3. Embossed.
4. Printed.

It would seem self-evident that whatever any of these qualifications may relate to, whether it be paper or surface-coated paper, they must all be held to relate to the same thing. It can not be maintained that the provision for embossed paper relates to embossed surface-coated paper while the provision for printed paper relates to plain printed paper or vice versa, or that the provision for metal-coated paper includes a plain paper metal coated, whereas the provisions for embossed and printed papers are limited to embossed or printed surface-coated papers.

At first blush there would appear to be considerable force in this contention, but keeping in mind the history of the legislation we are to look at the language employed to see if we can gather a true meaning consistent with that given to substantially similar language by the administrative department during the time that the act of 1897 was in force. For it will be noted, with reference to this question, that it would be difficult to point a distinction between the two acts.

Undoubtedly all the provisions of the second clause of paragraph 411 here in question relate to paper with a coated surface or surfaces, and, undoubtedly, in order to bring embossed paper or printed paper within the provisions of the second paragraph, such paper must be surface coated. And so it may be said of metal-coated paper or paper coated with gelatin or flock, that it must likewise be surface-coated paper. But we think it does not follow from this concession that it must be paper coated previously to the operation of being covered with metal or its solutions or with gelatin or flock. The second clause of this paragraph may be construed as referring to surface-coated paper and should be construed as if the language employed were as follows: "If wholly or partly covered with (*i. e.*, if the coating of such surface-coated paper consists of) metal or its solutions, or with gelatin or flock (*i. e.*, if the coating of such surface-coated paper consists of gelatin or flock), or if (such surface-coated paper be) embossed or printed."

This interpretation does no violence to the language employed and results in giving effect to what we believe was the manifest intention of Congress. It also gives force to the well-established rule that where statutory language has been given a long-continued administrative construction a reenactment of the statute in substantially the same language is presumed to have adopted the interpretation thus given.

One further point is urged, and that is that if the interpretation indicated be given this act, the language occurring in later clauses—papers, including wrapping paper, with the surface decorated or

covered with a design, fancy effect, pattern, or character, whether produced in the pulp or otherwise, but not by lithographic process four and one-half cents per pound; if embossed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, five cents per pound and twenty per centum ad valorem"—is unnecessary and redundant. It may be conceded that this language was unnecessary. The reason for its introduction, however, is not difficult to ascertain. The section was dealing with papers which had been given a somewhat lower rate of duty than that included in the first and second clauses of the paragraph. This language may have been employed for the purpose of making it clear that, even though papers should fall within the class providing for the lower rate, yet it was not the intent that (if such papers were embossed or wholly or partly covered with metal or its solutions, or with gelatin or flock) therefore the lower rate should prevail; and the higher rate was reasserted. But if we assume that the clause is redundant and wholly unnecessary for any purpose, we think the language employed in the second clause, in view of the history of the legislation upon the subject and the construction given to the previous acts, leaves no uncertainty as to the intent of Congress.

The board held this importation dutiable, as falling under the second clause of the paragraph, and in so holding committed no error. The decision of the board will be *affirmed*.

DE VRIES, Judge, did not sit in this case.

PEACOCK & Co. v. UNITED STATES (No. 642).¹

LEAKAGE OF SAKE NONDUTIABLE UNDER TARIFF ACT OF 1897.

The evidence shows apparently that the leakage here occurred before importation. Under paragraph 296, tariff act of 1897, sake was held dutiable by similitude only as still wine; and, further, the provision in that paragraph that no allowance should be made for leakage of wine could be made to apply to this importation only by construction. To apply it by construction is to do violence to an accepted principle of law. The leakage of sake was not dutiable.—*United States v. Gonsalves* (2 Haw. Rep., 354; T. D. 26737).

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24628 (T. D. 31236).

[Reversed.]

Curie, Smith & Maxwell (W. Wickham Smith and Thomas M. Lane of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1897 the appellants imported from Kobe to Honolulu 500 casks of sake, which is an intoxicating beverage made

¹ Reported in T. D. 32047 (21 Treas. Dec., 595).

from rice by a process somewhat akin to brewing, and which possesses some slight resemblance to still wines.

The United States gauger found that 475 of the imported casks were full to their capacity, that 7 of them were entirely empty, and that 18 of the casks were partly empty. These latter casks had a net capacity of 166 and a fraction gallons, but contained in fact only 81 and a fraction gallons, leaving them 85.1 gallons short of their net capacity, after deducting the $2\frac{1}{2}$ per cent of allowable outage. The invoice failed to state the quantity of sake which was in the casks when they were exported. It has therefore been properly accepted as a fact throughout this litigation that the casks were filled to their capacity at exportation.

The collector classified the importation by similitude with still wines containing more than 14 per cent of absolute alcohol, and assessed the same with duty at 50 cents per gallon under paragraph 296 of the act of 1897.

It appears from the printed record and from the official documents in the case, which are forwarded therewith, that the duty upon the cargo was thereupon liquidated at the rate of 50 cents a gallon, computed upon the actual contents of the casks as ascertained and reported by the gauger. The full casks were assessed upon their capacity; the empty casks were not assessed at all; and the partly empty casks were assessed upon the actual contents thereof, which was 85.1 gallons less than their entire capacity.

About three months after this liquidation, however, the collector was directed by the department to reliquidate the entry above stated, in so far as it related to the 18 partly empty casks, by requiring an additional payment from the importers, so as to make the entire payment equal to the duty at 50 cents a gallon computed upon the full capacity of the casks, less only the $2\frac{1}{2}$ per cent of allowable outage. The result of this, of course, was to require payment of duty by the importers upon the 85.1 gallons net shortage in the 18 partly empty casks. Acting upon this authority, the collector reliquidated the entry by requiring the payment of the additional duty required thereby.

The importers duly filed their protest to this order of reliquidation, and contended that the gauger's finding correctly stated the quantity of sake which had reached port, and that duty should therefore be assessed upon that quantity alone and not upon the quantity which had been exported. They contended that the shortage in the 18 casks had resulted from leakage at sea in transit, and that no duty should be collected upon the 85.1 gallons of sake thus actually failing of importation.

This protest was heard by the Board of General Appraisers and was overruled. The importers now pray for a reversal of that decision of the board.

As has already been noted, the collector classified the imported sake by similitude with still wine under paragraph 296 of the act of 1897 and assessed duty accordingly. This classification is no longer open to controversy; the final word of a long history of litigation upon that subject was spoken by the Supreme Court in the case of *Komada v. United States* (215 U. S., 392). The controversy in this case does not therefore relate to the classification of the importation nor to the rate of duty assessed pursuant thereto, but it relates solely to the quantity upon which the rate of duty should be assessed in the matter of the 18 partly empty casks.

Two questions present themselves as parts of this issue. One relates to the facts and the other to the law. How much sake, according to the record, did actually reach port? And if the quantity which actually reached port was less than the quantity exported because of leakage in transit, should the duty be assessed upon the quantity exported or only upon that part of it which actually reached port?

Taking up the question of fact first, it is conceded that the casks were full when they were shipped at Kobe, and that the only evidence concerning their contents upon importation is that contained in the report of the gauger and the statements in the official documents above mentioned in connection therewith. It appears therefrom that when the vessel was unloaded at Honolulu the 18 casks in question were found to be lightweight, and in accordance with instructions from the collector were set aside for the gauger's inspection. The gauger made the inspection and found them to contain the quantities set forth in his report, the only direct evidence of leakage being the varying quantities of liquor found in the various short-weight casks. The gauger filed his report setting out the finding as first above noted. The first liquidation was thereupon made upon the basis of that finding and report.

This evidence is somewhat meager, and yet it seems to be much more consistent with the theory of a loss by leakage before importation than with any other theory. It is a matter of common knowledge that losses do sometimes occur by leakage of liquors from casks while in shipment. It is evident that both the gauger and the collector were satisfied at the time of the first liquidation that such a loss had happened in this case. The matter was then fresh in their attention, and this was the impression made upon their minds by what they saw. The importers must have been then and there given to understand that there was no dispute about the facts. It is

apparently conceded even yet that this finding was correct in so far as it related to the 7 casks which were wholly empty. They, too, had been full at exportation, but they were found to be wholly empty when examined by the gauger. Even in the reliquidation subsequently directed no duty was assessed upon the sake which was in these casks when they were exported, evidently because it was still accepted as a fact that their contents had been wholly lost by leakage at sea before they reached port. The same evidence, however, exists concerning the shortage of the 18 partly empty casks. It is true that the leakage in both cases may possibly have occurred after the vessel reached port and before it was unladen, in which event of course the shortage should not be allowed, but it is highly probable that a leakage so recent could have been detected and located as such. Under all the circumstances, therefore, the natural conclusion seems to be that the shortage resulted from leakage which totally emptied some casks and partly emptied others while the consignment was in shipment prior to importation. Furthermore it may be noted that in the direction given by the department to the collector for reliquidation the foregoing question of fact in relation to the contents of the casks at importation was not set out as the basis of the ruling, but only the question of law above suggested. It does not seem to have been denied even then that the leakage in question had occurred before the vessel reached port. The collector was, however, referred to preceding rulings of the department to the effect that no allowance should be made for leakage of sake while in transit, because the law prohibited such allowance even if the shortage occurred before importation. The reliquidation as thus directed was not therefore had because of a controversy about the facts in the case, but rather because of the position taken by appellee in its construction of the law as above indicated.

Coming, therefore, to the issue of law involved in the case, it appears that sake was not specially mentioned in the tariff act of 1897, and that it was classified by similitude only as still wine under paragraph 296 of that act. In that paragraph it was expressly provided that no allowance should be made for leakage on wines, liquors, cordials, or distilled spirits. It is contended by the Government that sake, being classified as still wine under the paragraph, was therefore also subject to the express proviso therein contained prohibiting any allowance for the leakage of such wines. It is contended by the importers that the proviso contained in the paragraph does not apply to sake because it relates in terms to actual still wines and does not include sake, which is not actually a still wine but was classified as such by similitude only.

Upon a similar issue of law the Board of General Appraisers announced an opinion in the case of Gonsalves et al., published as G. A. 5690 (T. D. 25332). In that case the board held with the contention

of the importers as above set out. The following is part of the syllabus of that decision:

1. EFFECT OF SIMILITUDE CLAUSE.

A finding under section 7, tariff act of 1897, that a nonenumerated article is similar, either in material, quality, texture, or use, to an article enumerated in said act does not place such nonenumerated article in the category of the enumerated article which it resembles for all purposes in administration of the law, but only for the purpose of making it subject to the same rate of duty.

2. SAKE—ALLOWANCE FOR SHORTAGE—PROVISO OF PARAGRAPH 296, TARIFF ACT OF 1897.

The proviso in paragraph 296, tariff act of 1897, which requires that "there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," does not apply to Japanese sake, dutiable by similitude at the same rate as still wine under said paragraph 296. An allowance must accordingly be made for sake which never reached the port of importation, having been lost in transit through leakage or other cause.

This decision of the board was affirmed by the District Court for the District of Hawaii in the case of *United States v. Gonsalves* (2 Haw. Rep., 354; T. D. 26737). The department, upon advice of the Attorney General, did not prosecute error to that decision. In the decision of the present case the board still adheres to the view of the law expressed by it in the case just above cited; the present decision of the board overruling the importers' protest is founded wholly upon its conclusion concerning the weight of the evidence upon the question of fact above stated.

The decision of the law question contained in the *Gonsalves* case commends itself as sound upon reason and authority. It can not be contended that sake is in fact a still wine; it was made dutiable as such under the act of 1897 by similitude only. The similitude paragraph of that act provided that every nonenumerated imported article which is similar, either in materials, quality, texture, or the use to which it may be applied, to any article enumerated in the act as chargeable with duty shall pay the same rate of duty which is levied on the article which it most resembles in any of the particulars before mentioned. It is by virtue of this provision that sake was assessed with the same duty as still wines. However, the provisions of the similitude paragraph above referred to do not undertake to place any imposition upon the article affected by it other than the appropriate duty only. The paragraph provides that such similar article shall pay the same rate of duty as that levied upon the dutiable article which it most resembles. There is no provision in the paragraph that such similar articles shall be subject to all the other laws and regulations appertaining to the dutiable article which it so resembles. Therefore, if any burden additional to the appropriate duty is levied upon any article by force of the similitude paragraph it must be done by construction alone. That is, the additional imposition in such case would not be levied because of any express provision of the law in that behalf, but would only be authorized by the general spirit

and intendment of the enactment as construed from its terms and the circumstances. If the restrictive proviso therefore contained in paragraph 296 is applied to sake it must be done by such implication or construction only. This would contravene the authoritative principles which are expressed in the following extract from *United States v. Wigglesworth* (28 Fed. Cas., 596):

It is * * * a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt such statutes are construed most strongly against the Government and in favor of the subjects or the citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import.

Under what may be termed the common law of the subject, duty should not be assessed upon such part of an exportation as fails to reach port, the general rule being that such parts of a shipment as are lost at sea before the vessel reaches port do not become an importation. This rule may of course be changed by legislation, and duty may be required from an importation upon its invoice or actual contents at exportation without deduction for losses in transit. It is also true that such an express provision in relation to wines, liquors, cordials, and distilled spirits does appear in paragraph 296 of the act of 1897. But sake does not come properly within any of these classes, for it is not properly either wine, liquor, cordial, or distilled spirits. If it were any of these articles, it would have been directly assessed as such. It was assessed with the same duty as wine by similitude only under the provisions of the similitude paragraph. That assessment, however, was not based upon construction only, but upon the express terms of the act; but there are no express terms which subject the article to any imposition other than the duty alone. Therefore, if it is to be taken out of the common law rule in relation to shortage as above noted, it must be taken out by construction and implication alone and not by force of any direct or express provision of the act to that effect. This would virtually be equivalent to levying an assessment upon the article by implication or construction alone.

Therefore, upon the entire record this court holds that as a matter of fact the shortage in the 18 partly empty casks like the shortage in the 7 entirely empty ones resulted from leakage at sea before importation, and as a matter of law, under the tariff act of 1897, such leakage thus occurring at sea before importation should have been deducted from the exported contents of the casks for the assessment of duty.

The decision of the board is therefore *reversed* and reliquidation ordered accordingly.

HODGART & Co. v. UNITED STATES (No. 661).¹**PLANIT PACKING FOR ENGINE PACKING AND CALKING PURPOSES.**

Tin parings and lead shavings obtained by the use of a lathe in the ordinary methods of turning bars of metal to shape and form might, it is true, be deemed waste, but there is no evidence here to negative the idea that these parings and shavings may have been produced for use in the manufacture of a packing. The appearance of the sample is suggestive of an article specially prepared for calking purposes. The importation was properly assessed under paragraph 199, tariff act of 1909, as articles or wares not specially provided for composed wholly or in part of lead or other metal.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25107 (T. D. 31429).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and J. Stuart Tompkins of counsel) for appellants.

Wm. K. Payne, Deputy Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved here is known as "planit" packing and is used for engine packing and calking purposes. It is not designed to be melted, but to be put in place by pounding. It was entered at the port of Chicago in October, 1909; was assessed for duty as a manufactured article wholly or in chief value of metal under the provisions of paragraph 199 of the tariff act of 1909, which reads as follows:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers claimed the merchandise to be dutiable as waste under paragraph 479 of the same act, which is as follows:

479. Waste, not specially provided for in this section, ten per centum ad valorem.

The Board of General Appraisers overruled the protests.

The only evidence is a sample of the importation and the testimony of one witness on behalf of the importers. From the latter it appears that the importation is composed of tin parings and lead shavings, and that these shavings are obtained by the use of a lathe in the ordinary methods of turning bars of metal to shape and form. In what proportion these tin parings and lead shavings are combined to constitute the merchandise before us the record does not show, nor does it appear therefrom how the same are united to form the "Planit" packing.

We are unable to discover in the record evidence sufficient to justify the conclusion that the importation is waste.

¹ Reported in T. D. 32048 (21 Treas. Dec., 600).

While it is argued for the importers that the packing is composed of shavings of tin and lead gathered up after they have been cut off by a sharp-edged instrument in the process of manufacturing other articles, which shavings, it is claimed, before being gathered up are waste, yet the record does not disclose clearly that such is the fact. The importers did not show how this "Planit" packing is made.

As a result of their combination, whatever it may be or however accomplished, these parings and shavings after being united have received a new commercial designation, namely, "Planit packing."

So far as the evidence discloses it is just as reasonable to infer that these shavings were produced for the express purpose of manufacturing this engine packing as it is to infer that they are the waste products of some other manufacture, as claimed by the importers. The appearance of the sample of the importation before us is suggestive of the fact that it has been specially prepared and fitted for calking purposes and tends to negative the claim that it is waste.

We think, as did the board, that the evidence is insufficient to overcome the presumption of the correctness of the collector's classification.

The judgment of the Board of General Appraisers is *affirmed*

AMERICAN EXPRESS CO. *et al.* v. UNITED STATES (No. 672).¹

BAYONETS ARE SIDE ARMS.

A bayonet when in use is affixed to a gun, but is not to be considered a part of the gun. The lexicons uniformly define "bayonets" as side arms. As such, they were dutiable under paragraph 154, tariff act of 1897, and are dutiable under paragraph 153, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7201 (T. D. 31477).

[Affirmed.]

A. L. Hirsch for the appellants.

Wm. K. Payne, Deputy Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

Several protests are involved in this case, but all relate to the same article—bayonets. Some of these importations were made while the tariff act of 1897 was in force, while others were made after the tariff act of 1909 became operative.

The single question is whether these bayonets are dutiable as "side arms" under the provisions of paragraph 154 of the act of 1897 and paragraph 153 of the act of 1909, which are as follows:

154. Swords, sword-blades, and side-arms, thirty-five per centum ad valorem.

153. Sword-blades, and swords and side-arms irrespective of quality or use, in part of metal, fifty per centum ad valorem.

¹ Reported in T. D. 32049 (21 Treas. Dec., 602).

or as parts of muskets or rifles under paragraph 157 of the act of 1897 and paragraph 156 of the act of 1909, the language of which is identical and is as follows:

Muskets, muzzle-loading shotguns, rifles, and parts thereof, twenty-five per centum *ad valorem*.

The collector assessed the same as side arms and the Board of General Appraisers affirmed the collector.

No question of commercial designation is made, and therefore the case turns upon what is the ordinary meaning of the words "side arms." Do they include a bayonet, or is a bayonet a part of a musket or rifle?

"Side arms" are defined by various lexicographers as follows:

Standard Dictionary:

Weapons worn at the side, as swords, pistols, bayonets, etc., especially swords.

Webster's Dictionary:

Weapons worn at the side, as sword, bayonet, pistols, etc.

Century Dictionary:

Weapons carried by the side or at the belt, in contradistinction to musket, lance, etc

Encyclopædia Britannica:

Side arms are those which, when not in use, are worn at the side, *e. g.*, daggers, swords, bayonets.

The term "bayonet" is uniformly defined and commonly understood to mean a dagger or short stabbing instrument of steel for infantry soldiers, made to be attached to the muzzle of a gun when in use.

It is contended by the importers that a bayonet is a part of a musket or rifle, while the contention of the Government is that although when actually put to use in war it is attached to the musket or rifle, as the case may be, yet it is not an ordinary part thereof, and properly falls within the definition of side arms. The definitions of the term "side arms" as given above strongly substantiate this claim.

It seems unnecessary to review in much detail the evidence introduced by both sides at the hearing before the Board of General Appraisers, but it is sufficient to say that witnesses on both sides agree that when attached to musket or rifle the bayonet impedes the successful use thereof in firing, which is concededly the prime purpose of its use and existence. In other words, the bayonet is an auxiliary weapon to be attached to the musket or rifle in actual warfare under certain conditions; is not ordinarily so attached, and when unattached and carried by the soldier is worn in his belt like other side arms. Then, again, both rifles and muskets have large uses other than for purposes of war, and in such cases the bayonet would not seem to be any part thereof.

In an earlier case before it (see Abstract 22335, T. D. 30208) the Board of General Appraisers said:

A rifle is a complete article without the sword bayonet, and the latter is not an essential or necessary attachment to the rifle. The bayonet is worn as a sword or side arm, and though it may be attached to a rifle, that use is simply optional.

And it referred to that decision in the case at bar.

In the case of *Schoverling et al. v. United States* (142 Fed. Rep., 302) it was held that an india-rubber recoil pad, intended to take the place of the heelplate of a gun for the purpose of resisting its recoil when discharged, was not dutiable as a part of a gun, on the ground that it was not an essential, but simply an optional, attachment thereto.

We think the Board of General Appraisers committed no error in its determination of this case.

The importers in their brief insist that if the court concludes the bayonet to be a side arm, yet it should, nevertheless, be classified as a part of a rifle, because it is claimed that where articles are designated in the tariff act under two classifications "they should be assessed under the classification carrying the lower duty." This proposition would, in view of the provisions of section 7 of the act of 1897 and of paragraph 481 of the act of 1909 that "if two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates," seem to be unfounded.

The judgment of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, did not sit in this case.

LITTAUER v. UNITED STATES (No. 676).¹

BEADS, STRUNG ON COTTON THREADS AT FIXED AND EQUAL DISTANCES.

The phraseology of paragraph 421, tariff act of 1909, relative to beads and spangles, discloses a substantial change from the language in the former law relating to the same subject matter, and it appearing the importation is of beads on strands of a permanent kind designed for use as embroidery just as imported, they will be deemed dutiable conformably to the requirements of that paragraph.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7215 (T. D. 31541).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Charles Duane Baker on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of small black beads strung upon cotton threads.

The collector assessed them as articles composed in chief value of beads under the provisions of paragraph 421 of the tariff act of 1909, and assessed duty upon them at 60 per cent ad valorem.

¹ Reported in T. D. 32050 (21 Treas. Dec., 604).

The importer filed his protest to this ruling and contended that the goods were dutiable at 45 per cent ad valorem as manufactures in chief value of glass or paste under paragraph 109 of that act.

The Board of General Appraisers heard this protest upon evidence and overruled the same. The importer now seeks a reversal of the board's decision.

The following is a copy of paragraph 421 of the act of 1909 under which the merchandise was assessed for duty:

421. Beads and spangles of all kinds, including imitation pearl beads, not threaded or strung, or strung loosely on thread for facility in transportation only, thirty-five per centum ad valorem; fabrics, nets or nettings, laces, embroideries, galloons, wearing apparel, ornaments, trimmings, curtains, fringes, and other articles not specially provided for in this section, composed wholly or in chief value of beads or spangles made of glass or paste, gelatin, metal, or other material, but not in part of wool, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief value of beads or spangles made of glass, paste, gelatin, metal, or other material shall pay duty at a less rate than is imposed in any paragraph of this section upon such articles without such beads or spangles.

As has already been stated, the articles in question consist of small black beads strung upon cotton threads. The beads are manufactured of glass and are hexagonal in form. The strands into which they are strung are strong and permanent in character. One thread in each strand passes over and through the beads and is knotted in such a manner as to hold them in place upon the string and maintain permanent and equal spaces between the several beads. Each string thus constructed is about 144 yards long and is fit as imported to be applied as a trimming or fringe to women's wearing apparel, and this is the use which is in fact made of the importations. It is conceded that the beads of each strand are more valuable than the threads upon which they are strung.

Upon these facts it is of course apparent that the beads in question can not be classified as beads "not threaded or strung;" nor can they be held to be beads "strung loosely on thread for facility in transportation only." Those classes are made dutiable by the first part of the paragraph at 35 per cent ad valorem.

The paragraph, however, further provides for "fabrics, * * * trimmings, * * * and other articles not specially provided for in this section, composed wholly or in chief value of beads." * * * This class of articles is made dutiable at 60 per cent ad valorem. The goods in question seem to fall directly within this classification; they are articles of permanent construction, composed in chief value of beads, fit and designed for use in their present condition as trimmings of the kind covered by the paragraph, and are aptly described by the terms therein contained. Therefore both by the direct language and by the constructive meaning of the paragraph it includes such articles as those in question in this case.

It appears that under the corresponding provisions of the tariff act of 1897 some confusion arose concerning the proper classification

of articles similar to these. That act contained no specific provision for beads "strung loosely on thread for facility in transportation only." In certain early decisions under the act the Board of General Appraisers held that beads thus loosely and temporarily strung should therefore be classified as manufactures not specifically provided for in the act and dutiable according to the component material of chief value thereof. This construction resulted from the fact that such bead articles could not be classified as "beads not threaded or strung," for they were in fact threaded and strung, however loosely and temporarily. Nor could such articles be classified as "fabrics, * * * trimmings, etc., composed wholly or in chief value of beads," because the temporary character of the string and the fact that they were not intended for use as thus loosely strung prevented such a designation. Therefore the construction above stated was adopted, and such beads thus temporarily strung were held to be articles not included within the bead paragraph, but dutiable as manufactures not specifically provided for according to the component material of chief value thereof. If the beads were composed of metal, glass, or paste, this rate was 45 per cent ad valorem; if they were composed of wax, the rate was 25 per cent. However, in 1902 the Board of General Appraisers reported a decision, as G. A. 5210 (T. D. 24013), in which certain strings of beads constructed like those at bar were placed within the same classification as the loose and temporary strings above described. This decision was afterwards repeatedly followed by the board in similar cases. These decisions contained no new or different construction of the statute from that above outlined, but they simply held as a matter of fact that strings of beads constructed like those herein involved were substantially similar to the loosely constructed strings above described and subject to the same classification.

The appellant in this case relies upon these rulings, and upon the executive practice which followed them, as authority for his present contention. In that behalf he contends that—

Upon a revision of statutes a different interpretation is not to be given to them without some substantial change of phraseology other than what may have been necessary to abbreviate the form of the law.

However, the answer which suggests itself to this argument is this: That the present bead paragraph does in fact present such a "substantial change of phraseology" from the former act, and the change covers the very matter in controversy. This appears in the first clause of paragraph 421 of the later act in the form of the specific provision above set out for beads "strung loosely on thread for facility in transportation only." By virtue of this provision the former classification of such articles according to component material of chief value is abrogated and they are made dutiable at the same rate as beads wholly unstrung. Consequently if the articles at bar are continued in the same classification with such loose strings of

beads they will not be dutiable according to the component material of chief value thereof, but at the rate specifically provided by the paragraph for such loose strings, which, as above stated, is the same rate as that imposed upon beads wholly unstrung. The articles in this case certainly can not share in this new specific provision, because the provision is expressly and even emphatically limited to beads loosely strung on thread for facility in transportation only. This language unmistakably implies that the provision shall contain only such strings as are so loosely strung as not to be fit for use as strands but which are to be separated and resolved into beads again for use. This therefore excludes from the provision all such articles as those herein involved; for these articles are not loosely strung on thread for facility in transportation only, and are not to be divided or separated for use after importation, but are articles of permanent construction designed to be finally used in the form in which they are imported. They must therefore fall within the second classification contained in the paragraph and are dutiable at 60 per cent ad valorem as assessed by the collector.

The decision of the Board of General Appraisers is therefore affirmed.

GOUSSIOS & Co. *et al.* v. UNITED STATES (No. 682).¹

1. AN ADMINISTRATIVE FOLLOWED BY A STATUTORY CONSTRUCTION.

It is true a more specific designation controls as against a general designation, that a designation *eo nomine* controls as against a description by class, but where there has been an administrative construction and this has been adopted into law this construction must control.—*Brennan v. United States* (136 Fed. Rep., 743).

2. OLIVES BARRELED IN BRINE.

To hold this importation to be "fruit in brine" and free of duty as such would be to hold all olives are duty free. The construction given in the administration of the law and the apparent adoption of this construction by subsequent congressional enactment makes black or ripe olives in brine dutiable under paragraph 275, tariff act of 1909.—*Causse Mfg. Co. v. United States*, G. A. 5417 (T. D. 24663), distinguished.

3. ALLOWANCE FOR BRINE, WHEN NOT MADE.

The actual quantity of olives in the importation was, it would seem, ascertained by the gauger and no allowance should accordingly be made for brine.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25647 (T. D. 31624).

[Affirmed.]

Hatch & Clute (Edward S. Hatch and Walter F. Welch of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importations involved in this case are of black or ripe olives, imported from Greece in barrels. Duty was assessed on the fruit at

¹ Reported in T. D. 32051 (21 Treas. Dec., 807).

the rate of 15 cents per gallon under paragraph 275 of the tariff act of 1909. The importers claim free entry under paragraph 571, which provides for "fruits or berries, green, ripe, or dried, and fruits in brine, not specially provided for in this section."

Paragraph 275 reads as follows:

275. Figs, two and one-half cents per pound; plums, prunes, and prunelles, two cents per pound; raisins and other dried grapes, two and one-half cents per pound; dates, one cent per pound; currants, Zante or other, two cents per pound; olives, in bottles, jars, kegs, tins, or other packages, containing less than five gallons each, twenty-five cents per gallon; otherwise, fifteen cents per gallon.

The provision for olives *eo nomine* in this paragraph is very broad, but standing by itself would most clearly cover the importations in question.

It is said by importer's counsel that under the tariff act of 1897 it was held that olives in brine were free of duty as fruits in brine, citing *United States v. Zucca & Co.* (175 Fed. Rep., 578). This is not, however, an accurate statement of the holding in that case. What was held in that case was that under the act of 1897, which provides for olives, green or prepared, in casks, 15 cents per gallon, ripe olives did not come within this designation; that they were not green olives; and that they were not prepared in the sense in which that term was used in the act. After fully discussing the testimony, the court said:

I know of no case where the courts have held that the application of salt and water alone constitutes a preparation, nor do I believe that such was the intent of Congress in using that language.

And it was further said by the court:

As the new tariff law of 1909 puts all olives on the same footing, it is unnecessary to further discuss the question, as any decision now made in the case at bar can only affect pending cases.

This case points clearly the distinction between the law of 1897 and that of 1909, and were the decision to be rested upon this case alone the Government's contention that by a change in the phraseology of the section relating to olives by the use of unrestricted language covering olives in bottles, jars, kegs, tins, or other packages, and eliminating the words "green or prepared," it would so broaden the provision of the earlier act as to include ripe olives, would be beyond question.

It appears by an examination of the decisions of the Board of General Appraisers cited in the brief of counsel that while the question appears not to have been much discussed, green olives and prepared olives were treated as dutiable under section 264 of the act of 1897 during its entire history.

The distinction between green and ripe olives was first made by a court decision in *United States v. Zucca, supra*, after the act of 1909

took effect. This case, however, was in affirmance of a decision by the Board of General Appraisers in 1906 and reported in G. A. 6505 (T. D. 27793), and the inference is very strong that the change in the law was made for the purpose of doing away with that distinction which the Board of General Appraisers had recognized.

To justify a holding under the present law that these olives are entitled to entry as fruit in brine we must conclude that the purpose was to admit all olives free, for no one can seriously contend that there is now any distinction between green olives and ripe olives, both the subject of importation.

But the contention of appellant's counsel is broadly that the terms of the free list above quoted for fruits in brine should be taken as more specific than the provisions for olives in paragraph 275, and cites, to sustain this contention, the case of *A. L. Causse Manufacturing Co. v. United States*, G. A. 5417 (T. D. 24663), which case involved a provision for fruits in brine in contest with cherries, green or ripe, under paragraph 262 of the act of 1897, the material part of which was deemed by the board to be—

Apples, peaches, quinces, cherries, plums, and pears, green or ripe, 25 cents per bushel; apples, peaches, pears, and other edible fruits, including berries, when dried, desiccated, evaporated or prepared in any manner, not specially provided for in this act, 2 cents per pound. * * *

The board, in construing this section 262, said:

In our judgment the terms "green or ripe," in paragraph 262, as was said by the Circuit Court in construing similar words in paragraph 580 of the act of 1890, refer to "fruits brought here in the state in which they are picked without being subjected to any preserving process." *Johnson v. United States* (66 Fed. Rep., 725). The imposition of a duty of 25 cents "per bushel" suggests an intent to include in paragraph 262 only fruit as picked from the tree. They would not fall within the second subdivision of the paragraph as fruits "prepared in any manner." This expression has been held under the application of the doctrine of *noscitur a sociis* to embrace only fruits preserved by drying processes. Citing *In re Curtis*, G. A. 5205 (T. D. 23987); *In re Loggie*, G. A. 4782 (T. D. 22545).

The board further said:

Not being specially provided for in paragraph 262 or elsewhere, they come within the enumeration of "fruits in brine, not specially provided for," in paragraph 559 of the free list as claimed.

This case can hardly be deemed an authority, for it was determined upon the case there considered that the importation was not specially provided for in section 262. It can not be truthfully said that olives are not specially provided for in the paragraph here under consideration.

Counsel next cites the case of *Brennan v. United States* (136 Fed. Rep., 743). This case was very carefully considered, and a very able opinion given by Putnam, C. J. This also involved paragraph 266 of the act of 1897, covering "oranges, lemons, limes, grapefruit, shad-docks, or pomelos, 1 cent per pound," in contest with fruits in brine,

the importation consisting of limes in brine. It was found by the uncontradicted evidence that the expressions "limes in brine" and "pickled limes" are in mercantile uses synonymous and interchangeable, and that there has always been a trade distinction between limes and limes in brine to the extent that if one asked a merchant for limes he would be given fresh limes. The court then discusses the rule invoked by counsel for Government that an *eo nomine* provision should generally be given controlling effect as against a general provision and the construction urged by the importer, and said:

Therefore it is that sometimes the ordinary rule that articles are not dutiable under general terms when a duty is imposed in specific language leaves it to be determined what is specific language, and whether it is that which contains a designation *eo nomine* or that which describes a class. Evidently language referring to the latter may be, under some circumstances, the more specific, and such apparently is the case at bar.

And then proceeds to say that—

Notwithstanding the great weight given in customs cases to the two rules of interpretation, which, as we have said, are relied on on the one side by the United States and on the other by the importer, there is another rule which masters them both.

The court then proceeds to point out that a distinction had been made in previous tariff acts covering a period of many years which limited the terms "oranges, lemons, and limes" as used in the context to fresh fruit, and that limes in brine were not to be classified under limes *eo nomine* and that as Congress had reenacted the various expressions involved without discrediting the Treasury interpretation thereof, it amounted in its several aspects to a statutory construction to the effect that the word "limes" does not include limes in brine, and concluded by saying:

This statutory construction is of the highest authority and masters all the other rules.

Unfortunately for the contention of the importer, if the same master rule be applied in construing the present statute, it is evident that it makes against the contention presented, as under the prior act of 1897, during its entire history, it would appear that olives answering to the description contained in paragraph 264 were assessed at the rate there fixed, although they were imported in brine.

It is also contended by the appellant that an allowance should be made for the brine in which the olives were shipped: There were numerous shipments involved in this case, one from Calamata and the others from other parts of Greece. The board found that the testimony on the part of the Government conclusively established that in all shipments of olives except those from Calamata the fruit is in a solid, compact condition, not increased in any way by the presence of brine; that a deduction should not be made for brine unless it were made to appear that the presence of the brine increased

the volume of the commodity, and that if you have a given gallon of dry olives a certain amount of liquid could be poured into the measure without increasing the volume of the fruit. The testimony in the case shows that all the olives were gauged for the purpose of ascertaining the gauge of the olives alone, and the gauger testified that the quantity of olives is always apparent to the gauger. The wantage in these various importations varied from 5 to 15 or 20 per cent.

The protest does not show that amount of brine was present in the Calamata olives, nor does the testimony establish satisfactorily that the gauger did not in this case, as in that of the other importations, ascertain with reasonable certainty the actual quantity of olives. The method employed seems to have been the usual one.

The decision is *affirmed*.

UNITED STATES v. BAUMGARTEN & Co. (No. 687).¹

CARVED MARBLE VASE COPY OF AN ARTISTIC ORIGINAL.

A carved marble vase, made by a sculptor as a copy of an original in the Borghese collection, is not to be deemed a manufactured article. The evidence shows that artistic skill was employed in its production, and it was properly held to be dutiable as a "sculpture" under paragraph 470, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25440 (T. D. 31543).

[Affirmed.]

Wm. K. Payne, Deputy Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Brooks & Brooks (*F. W. Brooks, jr.*, of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellees imported into this country a carved marble vase, which is a copy of one of the vases in the Borghese collection at Rome.

Duty was assessed upon the article by the collector at the rate of 50 per cent ad valorem as "marble manufactured into a vase," under the provisions of paragraph 112 of the act, which reads as follows:

112. Marble, breccia, onyx, alabaster, and jet, wholly or partly manufactured into monuments, benches, vases, and other articles, or of which these substances or either of them is the component material of chief value, and all articles composed wholly or in chief value of agate, rock crystal, or other semiprecious stones, except such as are cut into shapes and forms fitting them expressly for use in the construction of jewelry, not specially provided for in this section, fifty per centum ad valorem.

The importers duly filed their protest to this classification, and contended that the importation should properly be assessed with duty

¹ Reported in T. D. 32052 (21 Treas. Dec., 611).

at 15 per cent ad valorem only, as a "sculpture," within the provisions of paragraph 470 of the same act, which reads as follows:

470. Paintings in oil or water colors, pastels, pen and ink drawings, and sculptures, not specially provided for in this section, fifteen per centum ad valorem; but the term "sculptures" as used in this act shall be understood to include only such as are cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as are the professional production of a sculptor only, and the term "painting" as used in this act shall be understood not to include such as are made wholly or in part by stenciling or other mechanical process.

The protest of the importers was sustained by the Board of General Appraisers, and the Government now appeals from that decision.

The question therefore is whether the imported vase should properly be classified as marble manufactured into a vase, or as a sculpture. In the former case it is dutiable at 50 per cent ad valorem, in the latter case at 15 per cent ad valorem.

The marble vase in question came from the studio of an Italian sculptor of ability and reputation, said by a witness to be one of the highest and best artists in Italy; it is identified as his production by the importer, who is himself a student of art and who is familiar with the artist's work. The witness had seen the artist at work upon a companion to this piece, and is able to recognize this article by its style of execution as the artist's own work. The vase is not an original creation of the sculptor, but is a copy of a classical masterpiece. The invoice value of the article is \$453, and it is apparent that it has no utilitarian value at all proportionate to this cost.

The article is made from a solid block of marble, and although the rough tooling was doubtless done by a whipper, yet the vase was carved by hand as the professional production of the sculptor himself.

A photograph of the vase is filed as an exhibit in the case, and it appears therefrom that it is an article of great beauty, that the part of chief value is a procession of human figures surrounding the bowl of the vase, which are cut in pronounced relief and give every evidence of great artistic merit. The work shows the application of personal study upon the part of the artist and proves the professional character and ability of its author. It is obviously no mere mechanical effort at a reproduction of the original.

These qualities seem to entitle the article in question to the name of a sculpture. Among the several definitions of that term cited in the briefs are the following:

Century Dictionary:

Sculpture.—A shaping art, of which the business is to imitate natural objects, and principally the human body, by reproducing in solid form either their true proportions in all dimensions, or else their true proportions in the two dimensions of length and breadth only, with a diminished proportion in the third dimension of depth or thickness.

Century Dictionary and Cyclopedia:

Sculpture is the expression of human thought and emotion in solid form; that is, in the three dimensions of space, length, breadth, and thickness. * * * If a work in sculpture gives to all three dimensions of space their full value, it is said to be "in the round;" if only length and breadth are completely expressed, and thickness or depth is abridged, it is said to be "in relief."

The New International Encyclopedia:

Sculpture, a term including all methods of producing a purely artistic result in solid form, as distinguished from architecture, in which utilitarian work is beautified.

Forms of sculpture: As to its forms and character sculpture is divisible into that which is in relief, in which the masses project slightly from a solid surface, and that "in the round," to use a phrase common among artists, and which denotes statues, busts, free groups, and the like.

The Government, however, contends that the article in question nevertheless comes with almost mathematical certainty within the class established by paragraph 112 above copied. That paragraph provides in terms for marble manufactured into a vase, and it is contended that the material of this article is certainly marble and the article which has been produced from that material is concededly a vase, and therefore that it must be marble manufactured into a vase. It is further contended that if the article in question is a sculpture and is also marble manufactured into a vase, the latter title should prevail in the classification because it is the more specific of the two.

The question therefore properly arises whether or not this article is marble manufactured into a vase within the meaning of paragraph 112.

A consideration of that paragraph leads to the conclusion that it was not intended to cover artistic productions in marble of such figures as are described in the foregoing definitions, whose value depends either upon the individual conceptions of the artist or upon his professional taste, touch, and spirit in execution, and that, therefore, the same article can not come properly within the terms of both of the paragraphs under consideration. It is true that such an article as the one in question comes apparently within the letter of paragraph 112, as contended by appellant; but it is foreign to its spirit. That paragraph groups such vases as it covers with monuments and benches, and thereby in part implies that the classification is intended to cover only such productions as are above denominated as utilitarian works which are beautified, and not such reproductions of animate or inanimate forms in marble as reach the dignity and character of studies by professional sculptors. The fact that the article in question is a vase and that marble manufactured into vases is specially named in the one paragraph does not, therefore, effectually conclude the argument. The form of a vase indeed has been used from ancient times as a medium for the finest artistic pro-

ductions, and in many such works the utilitarian character of the article is wholly lost in its artistic character. In the case at bar the form of a vase has been used by the artist merely as a support for the real work of the piece, and the importation is indeed doubly removed from utilitarian character by reason of the fact that it is a copy of an article which is preserved in a famous collection as a work of art of classical merit.

Again, the word "manufactured," used in paragraph 112, also confirms the view here suggested. That word as implied from its etymology originally meant made by hand, but in present-day usage it carries quite a different meaning; it now more nearly means made by machinery, or at least made in large quantities and as part of a regular business. A piece of marble chiseled by a sculptor into life-like figures imposed upon the bowl of a vase, all comprising a single professional production full of artistic character, would not now ordinarily be said to be marble manufactured into a vase.

Nor does the fact that the work is a copy of an ancient masterpiece rather than an original conception of the artist change this conclusion. It is a matter of common knowledge that appropriate works thus reproduced are treated as sculptures quite as much as if they followed living models or actual inanimate objects. In the case of the copy the idealization is provided for the artist by the original, but the execution of the copy may nevertheless engage and require professional character and ability of a high order. This is proven by an inspection of the photograph of the work at bar, which may easily be distinguished from a marble vase manufactured by machinery or formed by the hand of a mere artisan.

There is high authority for the view last above expressed, as appears from the following excerpt from the opinion of Mr. Justice Gray in the case of *Tutton v. Viti* (108 U. S., 312, 313):

There is nothing in the acts of Congress to limit the professional productions of a statuary or sculptor to those executed by a sculptor with his own chisel from models of his own creation, and to exclude those made by him, or by his assistants under his direction, from models or from completed statues of another sculptor, or from works of art, the original author of which is unknown. An artist's copies of antique masterpieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors.

These considerations are all consistent with the obvious legislative purpose incorporated into the respective paragraphs under review. The "manufactured" paragraph levies a duty of 50 per cent ad valorem, whereas the "sculptors" paragraph provides for a duty of only 15 per cent ad valorem. This lesser rate is in the interest of art and education and in acknowledgment of the labors of professional artists. The article in question properly belongs in character to this latter sphere notwithstanding its seeming literal identity with the articles named in the other paragraph. In this view of the case, the decision of the board is therefore *affirmed*.

TUSKA, SON & Co. *et al.* v. UNITED STATES (No. 692).¹

ARTIFICIAL SHAMROCKS, ARTIFICIAL LEAVES.

It is a matter of common knowledge that the leaves of the shamrock are trefoil in shape and green in color. The importations are not toys, and while partly made of silk they resemble shamrock leaves. They may be aptly described as artificial shamrocks, and they were properly held dutiable as artificial leaves under paragraph 438, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEALS from Board of United States General Appraisers, Abstract 25543 (T. D. 31589), and Abstract 25835 (T. D. 31675).

[Affirmed.]

John Giblon Duffy and *Joseph G. Kammerlohr* for appellants.

Wm. L. Wemple, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The protests here relate to an article referred to in the record as toy shamrocks, sometimes as artificial shamrocks. They were classified and assessed for duty as artificial leaves under paragraph 438 of the tariff act of August 5, 1909, the material part of which is as follows:

438. * * * Artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, sixty per centum ad valorem. * * *

They are made of silk and metal, having in addition in some instances a miniature clay pipe or hat attached thereto, and for the purposes of the case it is conceded that silk is the component material of chief value.

The importers claim that the merchandise is dutiable under paragraph 403 of the same act, the material part of which is as follows:

403. All manufactures of silk, or of which silk is the component material of chief value, * * * not specially provided for in this section, fifty per centum ad valorem. * * *

The protests were overruled by the Board of General Appraisers and the case is duly here upon appeal.

The articles appear to be made by forming a small wire into a trefoil shape and filling the space inclosed thereby with threads of silk yarn extending from the periphery through the approximate center of the shape. The yarn is colored green, and three of these trefoil shapes so filled with silk yarn are placed upon a single wire stem, which is tightly covered or wound with some green-colored paper or fabric. The greatest diameter of these shapes, so far as disclosed by the exhibits before us, is about three-fourths of an inch.

¹ Reported in T. D. 32053 (21 Treas. Dec., 615).

The contention of the importers is that the provision of paragraph 438 for artificial leaves must be confined to such articles or their parts as truly simulate natural leaves, and that the merchandise at bar does not simulate such leaves and can not, therefore, in any sense be described as an imitation thereof.

The board in effect found that the importations are artificial shamrocks, which we understand, amongst other things, to mean that they do simulate the natural shamrock; but it is said that the evidence does not sustain the finding, and it is pointed out that one witness introduced on behalf of the importers testified that the exhibits in the case presented no resemblance to the natural shamrock and bore no similitude to any natural leaf whatever.

We have carefully examined the record, and therefrom it appears that the only witnesses introduced were on behalf of the importers and that one witness did testify as claimed by the importers. It also appears that another witness testified in substance that the exhibits did resemble the shamrock in shape and color, although he said he was not prepared to say whether or not they were larger or smaller than the natural leaf of the shamrock. Some of the importers' witnesses testified that the articles are bought and sold all over the United States as toy shamrocks; that they are pretty generally worn as the emblem of the shamrock by men, women, and children, mainly of Irish parentage, on St. Patrick's Day; that they are largely handled in the toy departments of various stores and are bought and sold as toy shamrocks, but not under the name of artificial flowers or foliage. They are not claimed to be dutiable as toys.

The board evidently affirmed the collector's classification upon the authority of former decisions of their own and that of United States *v. Cattus* (167 Fed. Rep., 532). An examination of that case shows that the articles were artificial shamrocks made of silk and metal, silk of chief value; that they were assessed as artificial leaves under paragraph 425 of the act of 1897, which was the predecessor of paragraph 438 of the act of 1909. It was there claimed they should have been assessed as toys. The Circuit Court of Appeals for the Second Circuit in substance said it appeared that they were sold as shamrocks, were used by the Irish of all ages as the national emblem on St. Patrick's Day, although they were imported by toy dealers and sold in toy shops, and sustained the assessment as artificial leaves. The only difference between that case and the one at bar that we are able to discover is that here it is contended by the importers that the articles are dutiable as manufactures in chief value of silk, while there it was urged that they were dutiable as toys.

We have no evidence as to the shape or size of the shamrock other than what we have already mentioned as embodied in the record. The Standard Dictionary defines "shamrock" as "any one of several

trifoliolate plants accepted as the national emblem of Ireland," and the cut of the same accompanying the definition shows a stock from which leaves issue in groups of three upon one stem, which leaves in form closely resemble that of the exhibits in question.

Various other lexicographers define the shamrock as a plant bearing trifoliolate leaves and generally refer to some variety of the clover as probably the true shamrock.

We think it is common knowledge that the leaves of the shamrock are of trefoil shape and of green color, which is the shape and color of the leaves on the exhibits in this case, and that it follows that these leaves do simulate and resemble the shamrock leaves and that the importations are artificial shamrocks. They have no considerable use as toys, but are, as the witnesses agree, worn in the United States as representing the national emblem of the Irish people on St. Patrick's Day. They are artificial leaves as classified by the collector and dutiable as such.

The judgment of the Board of General Appraisers is *affirmed*.

WHITE & Co. v. UNITED STATES (No. 702).¹

1. PLAIN WOVEN FABRICS.

Plain woven fabrics are to be distinguished by their not having twilled or figured effects produced in the process of weaving.

2. LINEN DAMASK NOT PLAIN WOVEN FABRICS.

The evidence shows that linen damask is not a plain woven fabric and it was properly held to be dutiable under paragraph 358, tariff act of 1909, "all woven articles * * * and all manufactures of flax * * * not specially provided for."

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7222 (T. D. 31588).

[Affirmed.]

Brooks & Brooks (*F. W. Brooks* and *E. P. Sharretts* of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Thomas J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers, G. A. 7222 (T. D. 31588), which affirmed the assessment of duty by the collector of customs at the port of New York on certain linen damask at the rate of 45 per cent ad valorem under the provisions of paragraph 358 of the act of 1909, the pertinent provisions of which are as follows:

* * * All manufactures of flax, hemp, ramie, or other vegetable fiber, or of which these substances, or any of them, is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

¹ Reported in T. D. 32064 (21 Treas. Dec., 617).

The claim relied upon by the importer is that the importation is dutiable under paragraph 357, which reads in part as follows:

* * * Plain woven fabrics, not including articles, finished or unfinished, of flax, hemp, or ramie, or of which these substances or any of them is the component material of chief value, including such as is known as shirting cloth; weighing less than four and one-half ounces per square yard and containing more than one hundred threads to the square inch, counting the warp and filling, thirty-five per centum ad valorem. * * *

The sole question involved in the case is, what was intended by the term "plain woven fabrics," as employed in paragraph 357 of the present act?

In the Standard Dictionary the term "plain weave" is defined as—

The first of the foundation systems of weave, having no conspicuous ornamentation; unadorned; unvariegated; in the case of cloths, not figured, or untwilled; as * * * plain muslin.

"Foundation weave" is defined as—

The three systems of weave, the plain weave, the twill and the satin weaves that are the foundation of all weaves.

"Twill" is defined as—

One of the three foundation systems of weave, in which the shuttle carries the wool (filling) threads over one and under two or more warp threads.

"Damask" is defined as—

A fine (light weight) twilled table linen. * * *

It is contended by the importer that as this damask is produced by plain warp filling threads which are white, extending in unbroken continuity throughout the entire fabric, at right angles with each other, in parallel lines and so plainly woven that each square inch of the fabric contains the same number of warp and filling threads, they should be deemed plain woven, and it is pointed out that the figure is produced not by means of extra shuttles or extra beams, as distinguished from fancy linens, which are produced by swivel or extra shuttles carrying additional or fancy threads, making raised figures which do not run parallel to the neighboring threads or at right angles to the warp and weft threads, as the case may be.

No authority is found for such a distinction between plain woven and fancy woven goods. On the contrary, under the tariff act of 1897, which, with respect to this question, is similar to that of 1909, it was said by the Board of General Appraisers as early as March, 1898, in T. D. 19098, that—

"Plain woven" manifestly means plain as distinguished from twilled or figured effects produced in the process of weaving. Citing 1 Spon's Encyc. Mfrs., p. 766.

It is true that in this case the utterance was a dictum, but in G. A. 5035 (T. D. 23386), in the matter of the protests of the present appellant and others, it was distinctly ruled that the definition used in the case above cited indicates what are not plain woven, namely, those having twilled or figured effects produced in

the process of weaving, and it was held that twilled burlaps were not included under the term "plain woven."

Again, in G. A. 6063 (T. D. 26445), the board held that twilled bagging was not plain woven, again holding that the term "plain woven," as used in the tariff act, was in contradistinction from twilled or figured effects produced in the process of weaving. This construction appears to have been followed while the act of 1897 remained in force. The presumption is very strong that, in reenacting this provision for plain woven fabrics, Congress intended to adopt the construction which had thus been given to it. See *United States v. Cerecedo* (209 U. S., 337), and *United States v. Falk* (204 U. S., 143).

The decision of the Board of General Appraisers, which sustained the action of the collector, is *affirmed*.

SEARS, ROEBUCK & Co. v. UNITED STATES (No. 724).¹

STEEL HAIR CLIPPERS NOT MACHINE TOOLS.

"Machine" in machine tools connotes the application of some kind of power in the operation of an implement other than hand power alone; and steel hair clippers are not to be deemed machine tools and dutiable as such, but are dutiable as steel not specially provided for, under paragraph 199, tariff act of 1909.

United States Court of Customs Appeals, November 22, 1911.

APPEAL from Board of United States General Appraisers, Abstract 26164 (T. D. 31774).

[Affirmed.]

Lester C. Childs for appellants.

Wm. L. Wemple, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of steel hair clippers used by barbers in cutting hair. These instruments are so generally and familiarly known as to require no description here. They were classified by the collector as manufactures of steel not specially provided for and were assessed with duty at 45 per cent ad valorem under paragraph 199 of the tariff act of 1909.

The importers duly filed their protest to this assessment and contended that the articles were assessable either directly or by similitude as machine tools at the rate of 30 per cent ad valorem under paragraph 197 of that act.

This protest was heard by the Board of General Appraisers and was overruled. The appellants now seek a reversal of the board's decision.

The question thus presented by appellants is whether these steel clippers are machine tools such as are specifically named in paragraph

¹ Reported in T. D. 32055 (21 Treas. Dec., 619).

197 or are manufactures of steel not specially provided for and coming within the provisions of paragraph 199.

The following definitions cited by counsel are taken from dictionaries of approved standing and authority:

Century Dictionary:

Machine tool.—A machine driven by water, steam, or other power for performing operations formerly accomplished by means of hand tools, as planing, drilling, sawing, etc., and taking its special name from the kind of work performed, as planing machine, drilling machine, etc. Also called engine tool.

Tool.— * * * Such machines as the lathe, planer, slotting machine, and others employed in the manufacture of machinery are usually called machine tools.

Standard Dictionary:

Machine tool.—A machine for doing work with cutting tools, or one utilizing minor tools in performing the actual work, as a lathe, planing, drilling, rabbeting, or tenoning machine; also a forming machine; opposed to hand tool.

Tool.— * * * By extension, a machine, as a lathe or a planer, employed in the making of machines. (See Machine tool.)

Webster's Dictionary:

Machine tool.—A complex machine for shaping materials; strictly, an adjustable machine with an automatic feed, for shaping metals by cutting; called also engine tool (1890).

Machine tool.—A machine for cutting or shaping wood, metals, etc., by means of a tool; especially a machine, as a lathe, planer, drilling machine, etc., designed for a more or less general use in a machine shop, in distinction from a machine for producing a special article as in manufacturing (1899).

American Encyclopædic Dictionary:

Machine tool.—A machine in which the tool is directed by guides and automatic appliances. It is a workshop appliance for operating upon materials in the way of shaping and dressing, having devices for dogging the stuff and feeding the tool. Among the tools of this class for working in metal may be enumerated the lathe and machine for planing, slotting, drilling, punching, and shearing. Machine tools for wood are lathes, saws of various kinds, machines for planing, molding, boring, mortising, dovetailing, rabbeting, tenoning, shaping, etc.

Knight's American Mechanical Dictionary:

Machine tool.—A machine in which the tool is directed by guides and automatic appliances, aptly called by Dr. Barnard "a mechanical artisan" with "iron arms." It is a workshop appliance for operating upon materials in the way of shaping and dressing, having devices for dogging the stuff and feeding the tool. Among tools of this class for working in metal may be enumerated the lathe and machines for planing, slotting, shaping, drilling, punching, and shearing. Machine tools for wood are lathes, saws of various kinds, machines for planing, molding, boring, mortising, dovetailing, rabbeting, tenoning, shaping, etc.

Spon's Dictionary of Engineering, page 2322:

Those machines used in the finishing and fitting of machinery, after the more important operations of either forging or casting the rough material have been effected, are collectively designated as machine tools. * * *

Although machine tools form an essential portion of the equipment in any machine shop, the circumstances under which they have to be designed are so various as to preclude the adoption of but very few standard tools, and the complex nature of their construction is indicated by the diversity shown in their construction.

Goodechild and Tweney's Technical and Scientific Dictionary (1906):

Machine tool.—A general term for machines used in engineering and allied work, e. g., planing, slotting, shaping, milling machines, etc.

Machine shop.—The part of an engineering works in which the lathes and other machine tools are worked, as distinguished from the erecting and fitting shops.

It appears from these definitions that it is rather doubtful whether the term "machine tool" may be properly applied to such tools as are used in cutting hair or performing like services. The term seems rather to apply to such tools only as are used in mechanical work dealing with wood, metal, or stone. But however that may be, the term certainly always connotes the application of some kind of power to an implement or tool for its use and operation other than hand power alone. As is stated in the Standard's definition above given, the term is "opposed to hand tool." Both the Standard and Century definitions make it synonymous with engine tool. Such an instrument as a barber's hair clipper would not therefore come within the definition of the term machine tool in either of the foregoing particulars.

In the case of *Myers v. United States* (1 Ct. Cust. Appls., 226), this court had before it certain floor planers, which it held to be machine tools within the meaning of that term as used in paragraph 197 of the present tariff act. The planers involved in that case were used for the purpose of planing wood floors. They bore a general resemblance to lawn mowers, and when in operation were moved over the floor by hand. The planing was done by steel knives which revolved upon a shaft in somewhat the same manner as knives of a lawn mower revolve. The power which propelled the knives came from an electric motor which was connected with the implement by wires. The machine performed work which would otherwise be accomplished by workmen using hand planes upon the floor. In the decision of the case just set out, Montgomery, presiding judge, says in conclusion:

We think, however, that within common understanding this implement is a tool to which power is applied and comes within any proper definition of a machine tool.

The line of reasoning pursued in the above-named case is authority for the conclusion reached in this.

In the case of *Sheldon v. United States* (T. D. 31657) this court held that such hair clippers as those in question are not "shears," but are manufactures of steel not specially provided for, and therefore properly assessable under paragraph 199 of the tariff act of 1909. In that case the question made by the importer's protest was whether or not such clippers were "shears," and the contention presented by the appellants in this case that such articles are machine tools was not made in the case. Therefore that decision is not conclusive of the present issue.

However, upon the reasons and authorities above given the articles in question are held not to be machine tools as claimed by appellants, and they are therefore yet left within their former classification as manufactures of steel not specially provided for. This classification as made by the board is therefore approved, and its decision is affirmed.

UNITED STATES *v.* SHALLUS (No. 223).¹

1. WHEN DUTY ATTACHES.

Duty attaches upon imported merchandise at the time the vessel, with the cargo aboard, arrives within the line of the customs district.

2. WHAT IS A NONIMPORTATION.

A cargo, or part thereof, so far destroyed as to be of no commercial value at the time the importation is brought within the customs district is not, as to the destroyed portion, deemed an "importation of merchandise" within the tariff laws of the United States, and therefore no duty accrues or can be collected thereon.

3. IMPORTATION DESPITE LOSS IN CARGO.

The destruction or loss of the whole or any part of a cargo of imported merchandise after this enters the line of the customs district and before it is unloaded from the vessel or entered or surrendered from the custody of the customs is not thereby exempted from the payment of duties, unless by reason of express statute or regulation and then as provided in that statute or regulation.

4. DECAY IN CARGO A QUESTION OF EVIDENCE.

The Congress has by remedial statute established a rule of evidence in determining the condition of merchandise at the time this crosses the customs line, and the quantity of the merchandise existing at the precise moment of importation, if made an issue, becomes a fact to be proved, as any other fact in issue, by evidence.

5. PRESENT FINDING AS TO LEMONS.

An examination of all the evidence in this case is persuasive of the correctness of the board's finding, except as to one entry, and on modification the finding is affirmed.

United States Court of Customs Appeals, November 28, 1911.

TRANSFERRED from United States Circuit Court, District of Maryland, Abstract 20361 (T. D. 29449).

[Modified and affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

James A. Fechtig, jr., and *T. Spence Creney* for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The importations were of lemons at the port of Baltimore. The controversy concerns the proper allowance for nonimportation, occasioned by decay and consequent destruction of a part of each of the cargoes at the time of importation.

¹ Reported in T. D. 32074 (21 Treas. Dec., 662).

This question has been the subject of many controversies; and the consideration thereof by customs officials, the Board of General Appraisers, the courts, and the Congress have been voluminous, extending over a long period of time.

Certain legal propositions underlying a solution of the question may be considered fundamental and established beyond controversy. First, and chief of these, is the well-settled legal postulate, that duty attaches upon imported merchandise at the time the vessel crosses the line of and within the customs district. This question has been so often mooted and consistently decided, as above stated, that extensive quotation, or other than citation, in its support would seem superfluous. *Meredith v. United States* (13 Pet., 486); *United States v. Vowell* (5 Cranch, 368); *Arnold v. United States* (9 Cranch, 103); *Lawder v. Stone* (187 U. S., 281); *Stone v. Shallus* (143 Fed. Rep., 486); *United States v. Habicht* (1 Ct. Cust. Appls., 53; T. D. 31031).

It is equally well established, as a fundamental principle of substantive law, that a cargo or part thereof so far destroyed as to become of no commercial value at the time the importation is brought within the customs district is not, as to the destroyed portion, deemed an "importation of merchandise" within the tariff laws of the United States, and therefore no duty accrues thereupon or can be collected therefor. *Lawder v. Stone* (187 U. S., 281); *Stone v. Shallus* (143 Fed. Rep., 486); *United States v. Habicht* (1 Ct. Cust. Appls., 53); *Marriott v. Brune* (9 How., 619).

An equally well-established fundamental principle of substantive law is that destruction or loss of the whole or any part of a cargo of imported merchandise after the same enters the line of the customs district and before the same is unladen from the vessel or entered or surrendered from the customs custody is not thereby, except as perforce of express statute or regulation and as therein provided, exempted from the payment of customs duties. *Belcher v. Linn* (24 How., 508); *Meredith v. United States* (13 Pet., 486); *United States v. Lyman* (26 Fed. Cas., 1024).

In some cases, as where goods are contained in bonded warehouses, such release from duties is expressly forbidden by statute. (Sec. 2983, Rev. Stat.) Such a loss is the proper subject of consideration by the Secretary of the Treasury. *Ferry v. United States* (85 Fed. Rep., 550.)

Assuming these uncontradicted propositions of law to be true, the determination of the amount of rot or decay existing in a cargo of imported lemons or fruit becomes one of evidence. It concerns the establishment of a fact, the exact status of which at the time the vessel crossed the customs line into the jurisdiction of the customs district is, owing to circumstances, impossible of precise and accurate establishment. The Government is authorized and warranted to

collect duties upon actual importations. The importer is called upon to pay duties upon actual importations. It is less difficult for the Government in the first instance to ascertain the exact amount of the importation and of consequent duties at the precise moment that the goods cross the customs line, in exact justice to the importing citizen, in the case of decay or rot, than it is for the latter to establish the precise amount of the importation at that time, as the former has legal custody of the goods. Both are confronted, in the legal aspect of the case, by a condition of facts and rest under circumstances against which each is relieved perforce of the legal maxim "*Lex non cogit ad impossibilia*" (the law does not seek to compel a man to do that which he can not possibly perform). It is equally within the spirit of this maxim that the law does not require a man in establishing his rights to establish that which is legally impossible for him under the circumstances to do.

While it is true under the ordinary hard and fast principle of substantive law that duties accrue upon imported merchandise at the exact moment they cross the line within the customs district, it is equally true that the whole framework of customs administrative law and regulations are constructed upon the principle that, while duties actually accrue at the time stated, the ascertainment of the amount of duties which have thus and then accrued, and the amount of merchandise which has been imported, its condition, and in every respect its dutiable status, are ascertained as of the time they cross said line by examinations and inspections of their condition at the subsequent time of weighing, gauging, appraising, etc. It would be a physical impossibility to otherwise ascertain their dutiable status.

In recognition of this truth the Congress by statute prescribed certain rules of statutory evidence to be ascertained at the time of examination or other inspection of the goods, and has enacted that the results then ascertained and certified shall become legal evidence of their existence at the time the goods were brought within the customs district. Section 2921 of the Revised Statutes provides, with reference to packages:

If, on the opening of any package, a deficiency of an article shall be found, on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties.

This statute, however, is remedial and not substantive. It establishes a rule of evidence denominating what shall constitute legally sufficient proof of the condition of the merchandise at the time of crossing the customs line and is not an amendment of or exception to the substantive law fixing the time when duties accrue.

While it has been held that this certificate by the appraiser is binding upon the collector, *United States v. Park* (77 Fed. Rep., 608), it is not the importer, and the quantity of the merchandise or extent of existing at the precise moment of importation, when made an

issue, becomes a fact to be proven as any other fact in issue by evidence. *Merwin v. Magone* (70 Fed. Rep., 776).

The burden of proof is upon the importer, protestant in such issues—*Denunzio Fruit Co. v. United States* (164 Fed. Rep., 909), *Merwin v. Magone* (70 Fed. Rep., 776)—as in others, to establish the allegations of his protest. *Arthur v. Morgan* (112 U. S., 495), *Herman v. Robertson* (152 U. S., 521), *Presson v. Russell* (152 U. S., 577).

We think the better reasoning is that he is not estopped from disputing a certificate by the appraiser that the goods were in sound condition or invoice quantities. Note the well-considered opinion and cases cited by Somerville, G. A., in G. A. 5891 (T. D. 25965).

The proof of necessity being related to a time subsequent to actual importation, the trial officer must call to his aid, in the ascertainment of its probably different condition at the previous period, that judicial notice afforded by the "actual course of nature." (1 *Greenleaf's Evidence*, sec. 3a.)

Remoteness, therefore, ordinarily would seem to go to the weight rather than the materiality of the testimony. The condition of the merchandise, such as fruit, and amount thereof which has withstood the ravages of decay, must of necessity depend upon many and variable conditions and circumstances. Its relative condition at the time of importation measured from any given time thereafter naturally differs in different kinds and classes or grades of the same kind of fruit, its condition when picked, length of voyage, season, and temperature during voyage, its manner of packing and storage, promptness in entry, unloading, examination, and numerous other conditions. These conditions and the witnesses before them all become factors upon and from which the trial court must base its conclusions.

These importations consisted of three cargoes of lemons. The record does not make clear, except indirectly, the interest and relationship of the witnesses.

The *Monviso*, containing 6,056 boxes, arrived at the port of Baltimore July 3, 1908. Entry was made and duty permit issued July 7, 1908, and the ship was discharged July 8, 1908. July 4 and 5 were legal holidays and entry could not on those days be made. The record shows no unusual delay in voyage. The board found and allowed 30 per cent of decay.

The *Citta di Palermo*, containing 13,000 boxes, arrived May 20, 1908. Entry was made May 21 and duty-paid permits issued May 21 or 22, 1908. The goods were unloaded by May 25 and 26, 1908. There was unusual delay in this voyage, owing to the vessel putting in en route to coal. The board found and allowed 30 per cent of certain portions, 15.5 per cent in others, and 8.5 per cent decay in other portions of this cargo.

The *Sicilia*, containing 8,124 boxes, arrived March 16, 1908. Duty-paid permit was issued March 19, 1908. The cargo was unladen by March 20, 1908.

We have examined the evidence in this case, including all reports of the customs officers, sale catalogues, and notations of decay thereupon by the witnesses, with great care.

Save in the case of the *Monviso*, we find nothing in the record warranting this court, in the light of its previous decisions, in disturbing the findings of the board. As to the *Monviso*, however, there is no evidence in the record supporting a further allowance than 15 per cent. The board allowance of 30 per cent is accordingly modified. As thus modified, the decision of the board is *affirmed*.

Modified.

CUCCIO & Co. v. UNITED STATES (No. 319).¹

IMPORTATION AND NONIMPORTATION.

Whether all, or a portion only, of a cargo of fruit constitutes an importation depends on the facts established by evidence in the particular case. In this particular case the board based its decision on the ground that the evidence offered by the importers was not convincing of error in the return made by the collector and no reason here appears to disturb that finding.—United States v. Shallus, *supra* (T. D. 32074).

United States Court of Customs Appeals, November 28, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 19724 (T. D. 29288).

[Affirmed.]

Walden & Webster (Howard T. Walden of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

BEFORE MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, JUDGES.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of United States General Appraisers affirming the action of the collector in assessing duty as lemons upon certain alleged worthless and decayed matter. The importation was at the port of New York. The collector assessed the entire importation, and the importer alleges in his protest that a portion thereof was decayed at the time of importation, and that as to that portion, therefore, there was a nonimportation, for which abatement of duties is claimed.

In United States v. Shallus, this day decided, we have considered the law applicable to this case, and it will be unnecessary, therefore, herein to reiterate the principles of law considered.

We, in effect, there held that duties accrue upon imported merchandise at the time the same crosses the line within the customs district; that the importer is entitled to an abatement of duties where there is a nonimportation of the whole or any part of such a cargo; that the provisions of section 2921 of the Revised Statutes relating to a certificate of shortage by the appraiser constitute a rule

¹ Reported in T. D. 32075 (21 Treas. Dec., 686).

of evidence in specific cases and not an amendment to or repeal of the existing law as above stated; that the amount of decay or shortage of an importation is, therefore, in each case a question of fact to be established as any other probative fact, an issue in the case.

In this case the collector assessed for duty the entire importation. There was no certificate by the appraiser or other customs official of nonimportation in whole or in part of the cargo. Examination was made of the merchandise upon the wharf after it was landed by the importer. The only witness who testified in the case was the importer, who stated he had made a complete and detailed examination. The Board of General Appraisers, weighing the testimony of the importer and the other facts in the record, determined and found that all of these importations which had been examined by the importer within six days after the arrival of the vessel were entitled to certain abatements of duties by reason of a shortage at the time of importation; that all of the shipments which were examined after six days after such arrival of the cargoes were not entitled to such abatements. The board expressly rests its decision upon the ground that the evidence offered by the importer did not convince the board that the return of the collector in the cases specified was incorrect. The board expressly stated that its opinion was not an attempt to make a hard and fast rule as to all cases. We can not read the decision of the board other than a finding of fact relating to the particular importations in question, and applicable to no other importations, and based solely upon the testimony in the record before the board in the particular case.

The board had before it on the one hand the return of the collector, upon the other hand the testimony of the importer. It weighed each carefully and made a specific finding of fact as to each protest and importation. It refused to accept the testimony of the importer in certain instances as sufficient to refute the presumption of correctness of the return of the collector. The record is significant of reasons why the board might decline to accept as conclusive the testimony of the importer as to some of these importations at least. The following is the testimony:

Q. Fruit containing 60 per cent of decay salable?—A. Salable?

Q. Yes. Can you sell fruit containing as much decay as that?—A. Yes. The buyers get stuck.

By General Appraiser SOMERVILLE: Generally state to the purchaser when you sell the goods what your estimate of the rot is?

A. Oh, no; we keep it for ourselves.

Q. Does he examine them himself before he buys?—A. Yes; of course he examines the best samples.

We are unable to discover in this record any cogent reason why the court should interfere with the finding of the board.

Affirmed.

UNITED STATES *v.* BAKER CASTOR OIL CO. (No. 456).¹

1. TARE, GENERALLY.

Impurities ordinarily present in an article of merchandise do not constitute tare; only those impurities not ordinarily present in the merchandise as traded in may be the subject of an allowance for tare.—*Seeberger v. Wright* (157 U. S., 183); *Shallus v. United States* (1 Ct. Cust. Appls., 316: T. D. 31408).

2. TARE IN CASTOR SEEDS.

Without passing on the relevancy, as testimony here, of a certificate showing the results of an analysis made at the place of export, this certificate may be taken as in the nature of an admission against interest, and since it is made apparent that no allowance is commonly made as between seller and buyer of castor seeds, except in cases where the impurities exceed 3 per cent, and then only for the excess over and above 3 per cent, the allowance here should have been, not for 5, but for the excess above 3 per cent, namely, 2 per cent.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7088 (T. D. 30878).

[Modified and affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Curie, Smith & Maxwell (*W. Wickham Smith* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise involved in this case is an importation of castor seeds or beans. Duty was assessed at the rate of 25 per cent per bushel of 50 pounds under paragraph 266 of the tariff act of 1909. The importers claimed an allowance for dirt, gravel, and other foreign substances, amounting to 4.99 per cent, and filed a protest with the Board of General Appraisers, which protest was sustained. The Government brings the case here by appeal.

The board found as a fact that there was present about 5 per cent of dirt, gravel, etc., and directed a reliquidation accordingly, relying for authority on the case of *Seeberger v. Wright* (157 U. S., 183), and the case turns upon the effect to be given to this decision.

It was said in the opinion of the board that this case has been criticized to some extent by inferior tribunals, but has never been overruled. It is true that the case has been distinguished in numerous other cases by inferior tribunals, and it is also true that it has never been overruled.

It is therefore essential to determine just what that case decided. This is to be determined by ascertaining the question presented to the court. The case was tried under a stipulation and among the facts found by the court was this: The invoices show the gross weight and tare of 5 pounds per bag and a deduction of 4 per cent for impurities. The collector, in assessing the duties, deducted the tare, which was the weight of the bags, but refused to allow anything for impuri-

¹ Reported in T. D. 32076 (21 Treas. Dec., 668).

ties, assessing a duty of 20 cents per bushel of 50 pounds upon the gross weight, less the tare.

It would appear, therefore, that in the case cited, at least as to the importation there considered, there was an allowance made by the seller for the impurities. There was nothing in the record of that case to show that this was an unusual allowance. As was said by the Court of Appeals in *United States v. Reid, Murdoch & Co.* (120 Fed. Rep., 242), involving imported currants, and in holding that the decision in *Seeberger v. Wright* was not controlling:

In that case (*Seeberger v. Wright*) * * * it was admitted or proven that it contained 4 per cent of impurities, while there was no proof that the imported article, according to the customs of the trade, contained any such impurity.

So, in dealing with the subject of shelled nuts, the court in *Spencer & Co. v. United States* (143 Fed. Rep., 916), referring to *Seeberger v. Wright*, and *United States v. Reid, Murdoch & Co.*, said:

Both cases make it plain that the important thing is to find out what the shelled nuts of commerce were when paragraphs 269 and 270 were enacted. These impurities are said to have appeared in the nuts since then. If this were so, and if the percentage of impurities has been clearly shown, there would be great force in the contention—

and it was held that no allowance should be made for impurities in an importation when there was nothing to show “abnormal quantities of foreign matter” in the importation, or where the merchandise did not vary from the “ordinary wholesale condition.” This case was, on appeal to the Circuit Court of Appeals for the Second Circuit, affirmed on the opinion by the district judge.

The case of *Seeberger v. Wright* was considered by this court in the case of *Shallus v. United States* (1 Ct. Cust. Appls., 316; T. D. 31408), and it was said:

The principle as to when tare is allowable is stated in effect that tare should be allowed only in such cases where its presence was uncommon to the condition of the merchandise as ordinarily dealt in in trade and commerce. In other words, the ordinary impurities of merchandise do not constitute tare, but the extraordinary impurities, such as are uncommonly present in the merchandise as bought and sold in trade and commerce, are alone the subject of allowance for dutiable purposes.

We think this is a correct interpretation of the *Seeberger* case.

The importers introduced as a part of their case a certificate made by the Incorporated Oil Seed Association, of London, England, which is claimed to be a report of the analysis of the seed in question, showing clean castor seed, 95.01 per cent; nonoleaginous, 4.99 per cent; fixed allowance, 3 per cent; and to be deducted from invoice, 1.99 per cent, totaling 100 per cent; “say, allowance to buyer, 1.99 per cent.”

Government’s counsel objected to the introduction of this testimony as hearsay. It was, however, admitted as a part of the *res gestæ*. The objection urged by Government’s counsel has much force, and it is very doubtful whether the board did not extend the rule of *res gestæ* to facts which as affecting the present issue con-

stituted a past transaction. But as the importer proved the presence of these impurities by other testimony, we do not deem it important to decide this question. In any view, the testimony offered may properly be used to illustrate and limit the testimony of the importer's witnesses, in so far as it militates against their claim, as in the nature of an admission against interest.

The attention of the importer's witness was called to this statement, and the following occurred:

Q. I also find on the right-hand side opposite, "Fixed allowance, 3 per cent." What does that mean?—A. That is the basis on which that seed is bought.

Q. Does that mean that it is bought with a margin of 3 per cent for dirt?—A. Some bought with a margin of 3 per cent, some with a margin of 1 per cent—

Q. I mean as to this particular transaction?—A. Three per cent.

Q. That means there was an allowance of 3 per cent?—A. The difference between 3 per cent and 4.99 per cent.

This is the only testimony showing what the castor seeds of commerce are, and from this it is plainly to be inferred that no allowance is made as between seller and buyer except in cases where the non-oleaginous substance exceeds 3 per cent, and then only for the excess above 3 per cent.

Applying that rule to the present case by accepting the finding of the Board of General Appraisers as to the quantity of impurities contained in the seed under consideration as 5 per cent, the allowance to the importer should have been for 2 per cent only, and the decision of the Board of General Appraisers is modified accordingly.

CATALDI AUROLA *et al.* v. UNITED STATES (No. 593).¹

ALLOWANCE FOR BREAKAGE, LEAKAGE, ETC.

The proviso to paragraph 307, tariff act of 1909, forbidding allowance to be made for breakage, leakage, etc., of merchandise therein described, must be strictly construed and can not be made to apply to merchandise not within its terms; but the legality of that provision itself is now *stare decisis*. The board rightly held the leakage here to be dutiable.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24585 (T. D. 31207).

[Affirmed.]

Joseph G. Kammerlohr for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers affirming the action of the collector in imposing duty upon 24 casks of wine, the sole question being whether the collector erred in refusing to allow a deduction for leakage.

The report of the collector states that the United States gauger in his return attached to the entry reports certain wantage in excess

¹ Reported in T. D. 32077 (21 Treas. Dec., 670).

of normal, which would indicate leakage. Duty was assessed on the amount found by the United States gauger plus wantage in excess of normal outage.

The proviso to paragraph 307 of the act of 1909, corresponding to like provisions in previous acts, reads as follows:

And provided further, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. * * *

Two contentions are made: First, that this proviso should be held applicable to goods after their arrival and before delivery to the importer; second, that it is beyond the power to tax goods that never arrived in this country.

It is conceded that the question is not new, as it was considered by the board in *Montague's case* (T. D. 26086), in which the earlier cases *In re Saenz & Co.*, G. A. 5891 (T. D. 25965), and *Gilmore's case*, G. A. 3692 (T. D. 17644), are reviewed. In the latter case it was said:

The effect of the present tariff law, as contained in said paragraph 244 (corresponding to the proviso to paragraph 307 of the act of 1909), is to bring broken bottles of wines and liquors, which may have been broken on the voyage of importation, within its special scope, and for such a deficiency of this kind of merchandise no allowance is provided. It is, in fact, expressly prohibited.

It is no reasonable objection to this construction of the law that it operates to assess duty arbitrarily upon goods which never arrived in this country. The requirement of the law is that wines and other spirituous liquors mentioned in Schedule H and imported in bottles or jugs "shall be packed in packages containing not less than one dozen bottles or jugs in each package, or duty shall be paid as if such package contained at least one dozen bottles or jugs." One bottle in a package would thus be assessed as if it were a dozen bottles, whether the deficiency may have occurred by accident or design. The validity of such a law was sustained over 20 years ago by Judge Shipman in *Bensusan v. Murphy* (10 Blatch., 530; 3 Fed. Cas., 239), decided by the Circuit Court for the Southern District of New York. The same reasoning applies in favor of the validity of a law which arbitrarily disallows any reduction of duties for loss by breakage, leakage, or other damage.

This case was followed in the *Montague case*. A review of this decision was sought by the Supreme Court, but the writ of certiorari was denied. See case reported under title of *Shaw v. United States* (203 U. S., 591).

This decision is not inconsistent with the decision of the court in *Marriot v. Brune* (9 How., 619). It was said in that case:

The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights.

The provision we are now considering is an administrative provision that was evidently designed to prevent fraud and for convenience in the administration of the customs laws.

So in *Lawder v. Stone* (187 U. S., 281). The Supreme Court, in referring to *Marriot v. Brune* and other decisions said:

It would require a clear expression by Congress of its intention to adopt a contrary policy before a court would be justified in holding that such was the purpose of the legislative branch of the Government—

that is, a purpose to assess duties upon goods not actually imported, and in that case fruit which had become decayed and practically destroyed in transit was held not subject to duty.

In numerous cases also the court has held that the language of the paragraph in question should be strictly construed, and it has not been applied to forbid allowance for leakage of articles not within the terms of the act. But beyond this the courts have not gone, and indeed every decision which has come under our notice has not only applied the rule fixed by the statute to cases falling strictly within it, but in no case has any doubt as to the constitutionality or validity of the act been expressed, with the exception of *Shaw v. United States* (141 Fed. Rep., 469; T. D. 26488), which was a review of the *Montague* case, in which case the Circuit Court in its decision made use of the statement that the power to collect duty necessarily implies that there must be some article imported into the United States on which duty is imposed. If this language be assumed to imply a limitation upon the power of Congress to refuse to allow for leakage, where an importation of some quantity of the article still occurs, it is a sufficient answer to say that that case was reversed on appeal to the Circuit Court of Appeals, and the opinion of the board affirmed. *United States v. Shaw & Co.* (144 Fed. Rep., 329). On application for certiorari to the Supreme Court, the writ was denied. (203 U. S., 591.)

The point involved is *stare decisis*, and we think that the question has been rightly decided.

The decision of the Board of General Appraisers is *affirmed*.

MICROUTSICOS *v.* UNITED STATES (No. 596).¹

PAPPERIOS SEED PACKED IN BRINE, PICKLES.

Seed pods of the papperios plant may not be deemed vegetables, but when packed in brine, in view of the marked change indicated by a comparison of the phraseology of paragraphs 252 and 253, tariff act of 1909, and the old law, they must be taken to be pickles, and are dutiable as such under paragraph 253 at 40 per cent ad valorem.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24628 (T. D. 31236).

[Affirmed.]

Hatch & Clute (Edward S. Hatch and Walter J. Welch of counsel) for appellant.

Wm. K. Payne, Deputy Assistant Attorney General (Wm. A. Robertson on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellant imported into this country a consignment of merchandise which was invoiced as twelve barrels of peppers in brine.

¹ Reported in T. D. 32078 (21 Treas. Dec., 672).

The collector classified the importation as prepared vegetables dutiable at 40 per cent ad valorem within the provisions of paragraph 252 of that act.

The importer protested, contending, among several alternative classifications, that the articles in question should be free of duty as fruits in brine under paragraph 571, or dutiable at 2 cents per pound as prepared edible fruits under paragraph 274, or dutiable at 20 per cent ad valorem as a nonenumerated manufactured article under paragraph 480.

This protest was heard upon evidence by the Board of General Appraisers, and was overruled. In its decision the board expressed the opinion that even if the importations were not properly classifiable as vegetables under paragraph 252, they would nevertheless be subject to an equal rate of duty as pickles under paragraph 253 of the same act.

The importer now prays this court for a reversal of the board's decision.

The pertinent parts of the several paragraphs above referred to read as follows:

252. Vegetables * * * if pickled, or packed in salt, brine, oil, or prepared in any way, * * * forty per centum ad valorem.

253. Pickles * * * forty per centum ad valorem.

274. * * * All edible fruits * * * prepared in any manner * * * two cents per pound.

480. That there shall be levied, collected, and paid on the importation of all * * * articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

571. * * * Fruits in brine (free).

The first inquiry which presents itself is whether the articles in question are either prepared vegetables or pickles; for if they are either they are dutiable at 40 per cent ad valorem which is the rate of duty assessed by the collector.

As has been stated, the importation was invoiced as peppers in brine. These peppers are the annual seed pods of the papperios plant, which grows in Greece, from which country the present shipment was made. The papperios, as the name indicates, is a pepper plant; it is of perennial growth and attains at times to a height of 6 or 7 feet; it has a woody stem and may be called a bush, or shrub, or a stunted tree. The pods are cut from the plant with a part of the soft, woody stem attached to them; they have a pungent taste and are eaten raw as a relish. Those which are not thus immediately consumed are packed in brine and eaten at meals as an appetizer, very much as olives are eaten. They are never cooked.

The pods are slender and very much resemble common string beans in size and shape. This resemblance is so patent that it immediately suggests their classification as vegetables.

However, the following well-known definition of vegetables should be consulted before acting upon this resemblance alone:

But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits, generally as a dessert. *Nix v. Hedden* (149 U. S., 304-307).

This definition certainly excludes the articles at bar from its terms, notwithstanding their appearance. For these articles are not herbs of annual growth like those named as illustrations in the foregoing definition, but are the product of a perennial plant; nor are they eaten as articles of substantial food, as are those named in the quotation, but as a mere relish preceding or during the meal to stimulate the appetite for substantial food; and they are certainly not grown in the kitchen garden, but are rather the product of an orchard.

Therefore within the authoritative definition above cited the articles in question can not be classified as vegetables.

The question whether the articles at bar are pickles or not next comes up for decision.

It is of course a matter of common knowledge that almost all pickles are composed of vegetables. This fact likewise appears in the definitions of the dictionaries. The following definition is taken from Murray's New English Dictionary:

Pickles, n.—2. Some article of food preserved in pickle; usually (pl.) vegetables (as cabbage, cauliflower, onions, cucumbers, walnuts, mangoes, etc.) pickled and eaten as a relish.

In those tariff acts which preceded the present one it seems to have been assumed that all pickles were made from vegetables, although this was placing a restriction upon the word which was hardly justified by common usage. In schedule G of the tariff act of 1883 the subject was covered by a provision for "vegetables, in their natural state, or in salt or brine;" in the act of 1890 paragraph 287 provided for "vegetables of all kinds, prepared or preserved, including pickles and sauces of all kinds;" in the act of 1894 paragraph 198 covered "beans, peas, mushrooms, and other vegetables, prepared or preserved, in tins, jars, bottles, or otherwise, and pickles and sauces of all kinds;" in the act of 1897 paragraph 241 named "all vegetables, prepared or preserved, including pickles and sauces of all kinds."

In none of these acts were pickles given an independent classification, but in each of them they were treated as a subdivision of vegetables. This construction was followed by the judicial decisions upon the subject. In the case of *Acker v. United States* (T. D. 78423), the Circuit Court, Southern District of New York, held that

pickled walnuts were not within the classification of pickles as established by paragraph 241 of the act of 1897, because they were not vegetables. Platt, Judge, in deciding the case said: "In order to be dutiable under the provisions of paragraph 241, the article to be assessed must be a vegetable." This decision stood at appeal at the time of the enactment of the act of 1909, but it was afterwards affirmed by the Circuit Court of Appeals, on the opinion of Judge Platt. (171 Fed. Rep., 77.)

However, in the act of 1909, under which the present importation was entered, a change appeared in the language of the enactment relating to vegetables and pickles. The following is a full copy of the corresponding paragraphs of the acts of 1897 and 1909 relating to this subject:

Act of 1897:

241. Beans, pease, and mushrooms, prepared or preserved, in tins, jars, bottles, or similar packages, two and one-half cents per pound, including the weight of all tins, jars, and other immediate coverings; all vegetables, prepared or preserved, including pickles and sauces of all kinds, not specially provided for in this act, and fish paste or sauce, forty per centum ad valorem.

Act of 1909:

252. Vegetables, if cut, sliced, or otherwise reduced in size, or if parched or roasted, or if pickled, or packed in salt, brine, oil, or prepared in any way; any of the foregoing not specially provided for in this section, and bean stick or bean cake, miso, and similar products, forty per centum ad valorem.

253. Pickles, including pickled nuts, sauces of all kinds, not specially provided for in this section, and fish paste or sauce, forty per centum ad valorem.

It will be observed that the changed language of the act of 1909 in relation to this subject is something more than a mere rearrangement of words in the interest of order or form of expression. To the contrary the change is material and goes to the substance of the classification. Whereas under the act of 1897, as well as the preceding ones, pickles had been directly classified as a kind or product of vegetables, now, after a period of litigation concerning the few kinds of nonvegetable pickles, the controlling enactment is changed so as to remove pickles from the vegetables paragraph and make them a class of themselves. This seems to express a legislative intent to use the word in the sense of its common acceptance. As stated in the above definition, pickles are generally composed of vegetables, but in a few instances might be nuts or like products. In this view the amended classification would make the preparation, characteristics, and use of the articles the determinative factors as to whether they were pickles, and would not arbitrarily limit the class to vegetable products only. It is well known that the word pickles in its ordinary meaning includes some few nuts and like articles which lend themselves readily to such preparation and use.

The appellant, however, calls attention to the fact that the present paragraph contains the terms "pickles, including pickled nuts," and contends that the foregoing construction is not consistent with this phraseology. Appellant argues that if the word "pickles" *ex proprio vigore* includes pickled nuts, it is unnecessary to follow that word with the provision "including pickled nuts," and that the presence of that phrase in the paragraph implies that without its use pickled nuts are not included within the classification. From this appellant contends that the word has been again used in its former restricted meaning. This argument is certainly a very reasonable one. However, it must be remembered that at the time of the preparation of the tariff act of 1909 the litigation concerning pickled nuts was pending in the courts, and it may well be concluded that the express mention of them in paragraph 253 was made out of an abundance of caution even to the extent of tautology. The presence of the phrase, "including pickled nuts," in the paragraph, does not therefore show that the word pickles had been used in its former restricted meaning but rather that two methods of enlarging the application of the word had been adopted, one by changing the general construction of the applicable provisions and the other by adding the quoted phrase so as expressly to cover that subject of litigation which was then before the courts and therefore distinctly within the legislative attention. According to this view, the word pickles as used in paragraph 253 of the present act includes such articles as these at bar.

It is contended by appellant that the articles at bar are certainly fruits in brine, and that they should therefore be so classified, even if they are also pickles, upon the ground that the first designation is more specific than the latter. Appellant says in that behalf that all fruits in brine may be pickles in the broad sense of that term, and even meats and fish in brine, but that all pickles are not fruits in brine. Hence "fruits in brine" is more specific than "pickles."

In answer to this it may be said that neither class is properly a species of the other nor is either so treated in the act. The class "fruits in brine" does not include the class "pickles" as a species, because most pickles are not fruits at all; and conversely the class "pickles" does not include the class "fruits in brine," as a species, because most fruits in brine are not pickles at all. Therefore the contention that one class is more specific than the other does not seem to afford a safe foundation upon which to predicate a decision of the issue. Nor does the act bring the articles into such a correlation as to justify such a finding.

It therefore appears that the articles in question were dutiable as pickles at 40 per cent ad valorem, which is the rate assessed by the collector and approved by the board, and the board's decision in that behalf is *affirmed*.

STINER & SON AND BISCHOFF & CO. v. UNITED STATES (No. 673).¹

POST CARDS WITH AN INDENTED EFFECT IN GOLD.

Embossing implies a perceptibly raised surface and a raised surface that is perceptibly a form, figure, or design, but the surface of such a form, figure, or design needs, in order to be embossed, to be raised only above the surface immediately surrounding it and not necessarily above the general surface of the article. Post cards ornamented by a printing in gold on a gelatin surface and impressed with an indented design, producing thereby an effect in relief, are dutiable as cards, "either die cut or embossed," under paragraph 412, tariff act of 1909; and this whether the embossed effect was or was not intended to be produced.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7202 (T. D. 31491).

[Affirmed.]

Brown & Gerry for appellants.

Wm. K. Payne, Deputy Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The collector of customs at the port of New York classified certain imported post cards as lithographic prints embossed, and accordingly assessed them for duty under the provisions of paragraph 412 of the tariff act of 1909, of which paragraph the following is the part pertinent to the issue:

412. Pictures, * * * cards * * *, and other articles, composed wholly or in chief value of paper, lithographically printed in whole or in part from stone, metal, or material other than gelatin * * * all other articles than those hereinbefore specifically provided for in this paragraph, * * * exceeding eight and not exceeding twenty one-thousandths of one inch in thickness, and less than thirty-five square inches cutting size in dimensions, eight and one-half cents per pound * * * and in addition thereto on all of said articles exceeding eight and not exceeding twenty one-thousandths of one inch in thickness, if either die cut or embossed, one-half of one cent per pound. * * *

To the classification of the merchandise as lithographic prints the importer made no objection. He claimed, however, that the cards were not embossed, and protested that the additional duty of one-half cent per pound imposed upon them by the collector on the assumption that they were embossed should not have been assessed.

The Board of General Appraisers overruled the protest and the importers appealed.

From the samples in evidence and the uncontradicted testimony produced on the hearing it appears that the following are the material and undisputed facts in the case:

The goods the classification of which is the subject of controversy are souvenir post cards of a special kind and make. The cards differ

¹ Reported in T. D. 32079 (21 Trans. Dec., 677).

from the ordinary souvenir post card in that the colors, pictures, figures, and designs with which they are embellished are not impressed directly on the paper, but on a coating of gelatin with which the reverse side of the card is surfaced. According to the testimony the cards are coated by superimposing them on glass plates which have been dipped in gelatin. When the cards are stripped from the plates they carry with them a layer of gelatin and are then ready to be printed. The printing we assume is accomplished by some photolithographic process, but whatever the method employed the result is that a picture or printing which is admitted to be a lithographic print is carried to the surface of the gelatin. If the embellishment of the card stopped at this point it might well be held to be a lithographic print and nothing more. It appears from the testimony, however, that at one stage or another of the manufacture of the cards the gelatin with which they are covered is softened by heat and covered with gold leaf. The cards are then run through a press and over a stamp or plate bearing a pattern or design in relief. The raised pattern or design presses the gold leaf into the gelatin and produces thereon an intaglio of itself in gold. The metal leaf which is not pressed into the gelatin is then brushed off, and the result is a lithographic picture embellished with greetings lettered in gold and with various figure designs and representations traced out in the same material. The board finds that with the exception of the lettering the effects in gold are raised above the surface of the gelatin and are therefore embossed. It is possible that here and there gold leaf which was not pressed into the design or figure stuck to the surface of the gelatin and was not brushed away after the presswork was completed, thereby giving an impression of roughness on passing the hand over the card. We think, however, that the samples and method of manufacture show with reasonable certainty that all lettering, outlines, and designs on the cards in gold, with the possible exception of certain parts of the scrollwork and other designs on Exhibit 3, Protest 419212, are intaglios and not cameos. Yet while that is true as to the ornamental effects in gold, with the exception of the scrollwork, and so forth, just mentioned, it is equally true that in the production of those effects other designs and figures have resulted which stand out in relief from the surface immediately surrounding them.

Thus, in the houses represented in Exhibits 1 and 2, Protest 442169, the boarding, the panes of the windows, the paneling of the doors, the bricks of a chimney, and the double triangular ornament in a gable are all raised above the gold border which immediately bounds them. The same may be said of the American shield and the paneling of the hand organ on Exhibit 3, Protest 419212. These are all forms, figures, or designs, and as they are actually raised above the surface

which immediately surrounds them and give the impression to the eye of standing out in relief we are of opinion that they are embossed within the accepted meaning of that term. We agree with counsel for the importer that the mere impression on a card of an intaglio design or figure does not necessarily result in the embossing of the surface surrounding it. Embossing implies not only a perceptibly raised surface but a raised surface which is distinctively and perceptibly a form, figure, or design. On the other hand, the surface of an embossed form, figure, or design need not be raised above the general surface of the article. It is enough if it be raised above the surface which immediately surrounds it. Neither does embossing necessarily require that the relief effect shall be directly produced by a die appropriate for the purpose. A die for the making of intaglios may be so used as to develop not only intaglio forms, figures, and designs but corresponding forms, figures, and designs the surface of which is in relief.

As suggested by counsel for the importer, any embossed effect in the cards here under consideration may be purely incidental to the production of the gold effects and may have been wholly beyond the intention of the manufacturers to produce. Nevertheless, if an embossed effect has been produced the fact that it exists and not the intention of the manufacturers must control classification. An attempt was made by the importer to show that cards such as those involved in this appeal are not known to the trade as "embossed cards." We think that no question of commercial designation can arise under that part of paragraph 412 which imposes an additional duty of one-half of 1 cent per pound on pictures, calendars, cards, and other articles of paper "if either die cut or embossed." Even if it be admitted that the term "embossed cards" has a specific trade meaning—that is to say, a general, uniform, and definite signification which identifies to the trade a certain distinct class of cards and distinguishes that class from all others—the admission avails nothing, for the simple reason that the duty is not laid on "embossed cards," but on cards and other articles "if either die cut or embossed." As there is no evidence in the record which would justify the conclusion that the phrase "if either die cut or embossed" conveys to the trade and commerce of the country a meaning or signification different from that conveyed by it to the popular mind, we must conclude that to that particular part of the paragraph no other interpretation should be given than that justified by the common, ordinary meaning of the terms used.

The decision of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, did not sit.

UNITED STATES *v.* ANDERSON & Co. (No. 727).¹

FORGINGS ADVANCED IN CONDITION.

Comparing paragraph 127, tariff act of 1897, with paragraph 123, tariff act of 1909, and especially taking into view what would appear to be a manifest legislative intention with respect to paragraph 123, as evidenced by its history, a forging is advanced in condition when the burr on the edge of the rough-forged article is removed by passing it over a grindstone, and a hoe rough forged, but so manipulated, is dutiable under paragraph 123.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7243 (T. D. 31740).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

No appearance for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation in this case is a diamond shaped hoe with a shank for attaching thereto a handle, in which shank is a hole apparently to aid in holding the handle in place by means of a rivet or screw to be inserted therein. Duty was assessed under paragraph 199 of the tariff act of August 5, 1909, the pertinent part of which is as follows:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, * * * or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers protested, claiming them to be dutiable under paragraph 123 of the same act, the material part of which is as follows:

123. * * * Forgings of iron or steel, or of combined iron and steel, but not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process, not specially provided for in this section, thirty per centum ad valorem. * * *

The Board of General Appraisers sustained the protest and reversed the action of the collector.

This cause is heard upon the record and brief of the Government, the importer not having filed any brief or made any argument before us.

No testimony was introduced before the board, except one witness on behalf of the importers. Therefrom it appears and the board found that these hoes are first rough forged from steel bars and then the burr which is left on the edge of the hoe by the forging process is removed by passing it over a grindstone. The hoes were not further manipulated, but were dipped in oil prior to being shipped.

In sustaining the protest, as appears from its decision, the board held that the reasoning of this court in the case of *Prosser v. United States* (1 Ct. Cust. Appls., 550; T. D. 31551) was controlling. In that case the statute especially construed was paragraph 127 of the

¹ Reported in T. D. 32080 (21 Treas. Dec., 680).

tariff act of July 24, 1897, the material part of which for the purposes of this case is as follows:

127. * * * Forgings of iron or steel, or of combined iron and steel, of whatever shape or whatever degree or stage of manufacture, not specially provided for in this act, thirty-five per centum ad valorem. * * *

In that case we held in substance that, with the development of improved methods and high-class machinery, it had been found more economical and that better and speedier results could be obtained by not trying to forge close or to remove from a forging in the forge shop surplus metal from a part thereof not readily accessible; that the rough turning or rough machining to which the merchandise involved in that case had been subjected was a substitute rather than an additional process, and was designed to finish the forging as such and not to complete the article evolved thereby; and that a forging as commonly understood might be defined to be a creation of forging processes; an article of metal shaped or formed by hammering or allied methods producing substantially the same results as hammering.

The Board of General Appraisers in this case, as appears from its decision, invoked that definition of forging and held that the work performed on the importations here was not other than forging work, and that they had not been advanced by processes other than forging and were, therefore, entitled to be so classified under paragraph 123.

We think in so applying the reasoning of the Prosser case the board, probably inadvertently, failed to give full force to the changes in paragraph 127 of the act of 1897 as the same appear in paragraph 123, above quoted. It will be noted that under paragraph 123, if a forging has been machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process it is not classifiable thereunder, while paragraph 127 of the act of 1897 provided that forgings of whatever degree or stage of manufacture should still be so classified.

In the Prosser case we undertook to say in substance that substituted processes which had for their sole purpose the removing of the surplus metal from rough forgings, when it appeared that such processes were applied because greater economy and better results could be obtained, did not deprive the article of its character as a forging.

We think, however, that Congress, by the enactment of paragraph 123, clearly determined that such a substituted process would take the article out of the classification as a forging if thereby it was advanced in condition, because it declares in effect that if machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process it shall not be so classified.

Now, in the case at bar, it is conceded that the merchandise has been subjected to a process or operation subsequent to the forging process in that the burr on the edge of the tool has been ground off upon a grindstone.

It is apparent that by the removal of the burr on the edge of the hoes in question by the grinding process after the forging processes

have been applied, these hoes have been advanced in condition because it is evidently desirable for their ordinary and most advantageous use that such burr should be removed. It is the final step in the processes of this manufacture.

Congress would seem to have intended by paragraph 123 that it should be a question of fact as to whether any process subsequent to that of forging had been used, and if so, the article would be deprived of its right to be classified as a forging if by such subsequent process it had been advanced in condition. It is not, we think, an answer to this to say, as is said in this case, that the forging processes might have been applied to have produced the same result as the grinding; the question is, what processes in fact have been employed in producing the article, and if it appears, as here, that a process other than forging has been subsequently used and the condition thereby advanced, then the article no longer has a right to be classified as a forging. In other words, Congress has seen fit to make that the test.

It is true that the manufacturer may, by the methods employed in manufacturing an article, determine its classification, but that is not a novel doctrine. In *United States v. Meadows* (2 Ct. Cust. Appls., 143; T. D. 31665), which, among other things, involved the question of whether cotton or leather was the component material of chief value of certain slippers, we held in substance that it was proper to inquire into the chronological order in which the component materials were united; that it did not matter if it appeared that by the adoption of a different order in combining the materials a different classification would have resulted; that the question in each case would among other things be determined upon the fact as to when—that is, in what order—the combination was made; that a manufacturer might find it on the whole to be to his advantage, in view of the results obtained, to make a combination in such a way chronologically as would effect the classification, and that he could do so at his own option.

This observation is especially applicable to the case at bar, for it appears from the evidence that although it is possible for the manufacturer to take the burr off from the edge of the hoe with a forge hammer instead of by the grinding process, yet it would cost ten times as much to do it that way; and it may be that on the whole it is commercially more advantageous for the manufacturer to produce these hoes so that they pay the higher rate of duty rather than to incur the greater expense of turning them out by the forging process so that they may take the lower one.

There is another reason, we think, which requires that paragraph 123 be given the construction we have indicated. At the time the act of 1909 was enacted the *Prosser* case above referred to was pending, and not only in that case but in others theretofore decided there had been much difficulty and disagreement as to the construction to be given paragraph 127 of the act of 1897. The attention of Congress was directed to this matter in "Notes on Tariff Revision."

prepared for the use of the Committee on Ways and Means in making up the tariff act of 1909, where it appears that some of the decisions on the subject of what were forgings were referred to, the respective claims of the Government and the importers relating thereto succinctly set forth, and an amendment of paragraph 127 was suggested which it was thought stated precisely in what degree of finishing or completion forgings might be imported without being construed as advanced from the class of forgings for tariff purposes. Congress adopted the amendment in the precise language as suggested by the compiler of the work. (See Notes on Tariff Revision, p. 154.)

We think thereby it accomplished that object and that it is plain that thereunder it is a question of fact whether or not an article has been advanced in condition by machining, tooling, or by any other process or operation subsequent to the forging process, and that when it so appears the article can not longer be classified as a forging.

We hold, therefore, that the board erred in sustaining the protest in this case, and its judgment is *reversed*.

UNITED STATES *v.* SQUIBB & SONS (No. 732).¹

1. JUDICIAL NOTICE.

Judicial notice will be taken of the prominent, important, and generally known facts of vegetable growth and life; but such facts as are of minor importance, not actually within the sphere of common observation and knowledge, will not be judicially noticed, even though such facts may be ascertained by reference to technical treatises.

2. CELERY SEED, AROMATIC VARIETY.

The evidence here, while not ample, is sufficient to support the finding that the importation was not garden celery seed, but celery seed of the aromatic kind, used commonly in the drug trade and as such was free of duty.

United States Court of Customs Appeals, November 28, 1911.

APPEAL from Board of United States General Appraisers, Abstract 26002 (T. D. 31727).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Leigh Dornburgh for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellee imported into this country a consignment of celery seed. Such seed is entitled to free entry by favor of paragraph 559 of that act if it be aromatic as distinguished from garden celery seed; if the seed be garden celery seed it is dutiable at the rate of 10 cents per pound by provision of paragraph 266 of the act as a seed not specially provided for.

The collector held that the importation was garden celery seed and assessed the same accordingly.

¹ Reported in T. D. 32081 (21 Treas. Dec., 683).

The importers filed their protest to this action of the collector and contended that the seed was not garden celery seed, but was in fact the aromatic variety and therefore entitled to free entry.

This protest was tried upon evidence to the Board of General Appraisers, and the board held it well taken and directed reliquidation accordingly. The Government now seeks a reversal of this decision of the board. The sole question in the case therefore is whether the decision of the board is sustained by sufficient evidence or not.

The evidence in the record tends to show that the importers are chemists engaged in the manufacture of medicines; that the seed in question was bought of a firm who dealt in crude botanical drugs, but not in garden seeds; and that the seed was in fact ground by the importers and made up into pharmaceutical preparations. One witness, J. Ernest Bradshaw, superintendent for a firm dealing in botanical drugs, including celery seed, testified from a sample of the seed that it looked to him to be a fair sample of the celery seed of the drug trade. Another witness, A. Lowell, who had served for 10 years in the employment of a large wholesale drug establishment, testified that he did not possess a very extensive knowledge of botanical drugs, but that he knew celery seed; that the wholesale druggists by whom he had been employed handled celery seed, but not the garden variety; and that the sample of the seed in question had the same general appearance as the celery seed which the drug firm handled at the time of his connection with them.

The sample of the importation which was exhibited to the witnesses, as above appears, was filed with the board, and is now before the court. The Government called no witnesses, and the foregoing is substantially all the evidence which was submitted to the board. Upon this evidence the board held with the importers.

While the testimony in support of the importers' claim is not very full or very convincing, yet in the absence of contradiction or avoidance it seems to be sufficient to serve as a predicate for the board's decision. The decision is certainly not wholly unsupported by evidence, nor is it clearly contrary to the weight of the evidence. It seems to be conceded that the two varieties of celery seed look very much alike. The testimony, as above outlined, is to the effect that drug houses deal, or at least profess to deal, only in the aromatic variety of celery seed; that the seed in question was bought by one such firm from another like firm; that it was treated as aromatic seed by its use in pharmaceutical preparations; and that two witnesses who had seen and handled the aromatic seed rather feebly identified this article as belonging to that class.

The Government contends that in the garden variety of celery seed each seed has 12 oil ducts, while in the aromatic variety each has but

6 such ducts; and it was suggested in the oral argument that this court would be able to find by examining the sample under the microscope that each seed has in fact 12 such oil ducts. The Government suggested in the oral argument that the court should thus supplement or complete the record, and inform itself of the facts by its own investigation in the premises.

However, it seems to be very doubtful whether the court should take judicial notice of the alleged fact that each variety of celery seed has a given number of oil ducts. There is nothing at all in the testimony upon this subject.

Courts will take judicial notice of the prominent, important, and generally known facts of vegetable growth and life; but such facts as are of minor importance to the community in general and are therefore not actually within the sphere of common observation and knowledge will not be judicially noticed, even though such facts may be ascertained by reference to technical treatises upon the subject.

And if the alleged fact concerning the oil ducts is not within judicial knowledge, it becomes even more doubtful whether in such case the court should undertake to inform itself upon the subject by a microscopical examination of the exhibit. Such an investigation made by the court in the absence of the parties, not for the purpose of better understanding or interpreting the testimony in the record, but rather for the purpose of bringing into the case a new line of evidence not even suggested by the record, would not be authorized by correct rules of procedure.

On the whole, therefore, it seems that the testimony upon which the case was submitted to the board and upon which its decision was founded is sufficient to sustain that decision, and it is *affirmed*.

OELRICHS & Co. v. UNITED STATES (No. 57).¹

1. JURISDICTION.

The importer himself having invoked a decision by the General Appraiser and later by the reappraisement board, bringing both the subject matter and the parties there; can not be heard to contend the board was without jurisdiction to reappraise the goods.

2. MANDATORY PROVISIONS OF SECTIONS 2901 AND 2939, REVISED STATUTES.

Though there may have been a failure on the part of the collector strictly to comply with the provisions of sections 2901 and 2939, Revised Statutes, governing the special designation of merchandise for examination and appraisement, nevertheless the Board of General Appraisers would be in duty bound, the goods in question remaining subject to their control and open to their inspection and examination, to resort, on appeal, to the best means at hand for making an appraisement; and though it should appear that one package in ten was not in some instances examined by the board, there being sufficient samples of the merchandise before them and these having been examined, there would be accordingly such a substitute process as the law contemplates and permits.

¹ Reported in T. D. 32091 (21 Treas. Dec., 703).

3. QUESTIONS OF FACT NOT RETRIED BY CLASSIFICATION BOARD.

It is not the province of a classification board to retry questions of fact determined by a board of reappraisement, and additional testimony offered before the classification board was properly excluded.—*Gulbenkian & Co. v. United States* (153 Fed. Rep., 858) distinguished.

4. EVIDENCE NOT FORMALLY OFFERED AND NOT OBJECTED TO.

The Government having tendered evidence, with the promise to support it with additional testimony to make it relevant, but failing in this, and there being no motion to exclude it, the action of the board in taking the testimony originally can not be urged to vitiate the board's finding in the case.

United States Court of Customs Appeals, December 6, 1911.

TRANSFERRED from United States Circuit Court for Southern District of New York, Abstract 19797 (T. D. 29306).

[Affirmed.]

Comstock & Washburn for appellants.

Wm. L. Wemple, Assistant Attorney General, and *Wm. K. Payne*, Deputy Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case has been transferred from the Circuit Court for the Southern District of New York. It is an appeal from a decision of Board 3 of General Appraisers overruling a protest which attacked the validity of an appraisement and reappraisement of certain wool imported from Russia. The wool in question was known as "Georgian autumns." It consisted of lamb's wool, white sheep's wool, and colored sheep's wool, separately packed and sorted and invoiced at separate values. The white wool was advanced in value by the appraiser to over 12 cents per pound, thereby increasing the duty from 4 to 7 cents per pound. This advance in value was sustained on reappraisement by General Appraiser Lunt, and on appeal to Board 2 to re-appraisement the action of General Appraiser Lunt was sustained. This proceeding followed.

On such an appeal the questions presented are narrow, as has been frequently adjudicated. All that is open for review is the question of whether the board acted within its jurisdiction. If it did, its decision is final and conclusive, and all other tribunals are bound to respect it.

It is claimed that this reappraisement is invalid for the reason that the provisions of sections 2901 and 2939, Revised Statutes, requiring the collector to designate at least one package of every invoice and 1 package in 10 of merchandise imported, and a greater number if it should be deemed necessary, to be opened, examined, and appraised, was not complied with by the local appraiser, and that there were not before Board 2 the originals or samples of this number of bales which had been designated and sent to the public stores for examination.

The meritorious question presented is whether upon the failure of the collector to comply strictly with the provisions of sections 2901 and 2939, and on appeal for reappraisement to the Board of General Appraisers, such board is bound to set aside the appraisement and permit the entry of the goods at invoice value, or whether such board still has the duty of making an appraisement, resorting to the best means at hand, so long as the goods are subject to their control and open to inspection and examination.

This question had some consideration in the case of *Tilge v. United States* (T. D. 31676). In that case it was said:

Under section 2899 of the Revised Statutes it is made the duty of the importer to hold this merchandise, available for examination in a manner therein and in his bond prescribed, until 10 days after final appraisement, or to compensate the Government under his bond for not so doing. When, therefore, by an appeal the General Appraiser, and in turn the Board of General Appraisers, are given jurisdiction of an appraisement, the record advises them of the precise subject matter thereof, what packages are in public stores or elsewhere subject to their order and examination and any goods not therein the subject of appeal, and the goods therein not the subject of an appeal and therefore unnecessary of examination. From this record he or they can determine precisely if samples will suffice for examination, and if so, what samples, and what of the goods may on application be released, and each is fully empowered to consent thereto. If examination of these samples duly selected and preserved is by him and the Board of General Appraisers deemed sufficient, that concludes the matter.

It was further said in the opinion:

The statement in the petition "that samples duly authenticated may be substituted for the public-store cases in reappraisement hearings seems to have been the opinion of the courts in various cases," is precisely in line with the holding of this court in the *Tilge* case; but the samples must be "duly authenticated." They must be authenticated by being selected from the importation and approved by the appraising officer having jurisdiction of the case and delivered by the importer in this country, who is under bond to so deliver them whenever duly demanded.

Some confusion may arise from the statement that the examination of 1 package in 10 contemplated by section 2901 is jurisdictional. It is undoubtedly true that these provisions are mandatory and for the benefit of the importer as well as of the Government. But does it follow that the failure to observe this mandatory provision shall for all time result in perpetuating an injustice to the Government and prevent an advance from the invoice value where the remedy of the importer which he seeks is an appeal to a general appraiser or to a board of reappraisement, thereby invoking the jurisdiction of an officer or body authorized by law to make reappraisement of importations? It would seem on principle that the importer, having thus invoked the jurisdiction of the general appraiser and later the reappraisement board, ought not to be heard to say that the board could not perform that function. It is not meant to say that in a case where it transpires after an appeal for reappraisement that there is no method by which the board can make a reappraisement based

upon examination of the goods in public stores or any substitute process which would be its equivalent, the importer may not raise this question. But where, as in the present case, the board had the opportunity to and did inform itself by an examination of the goods the subject of the appeal or of selecting samples thereof if they chose from the body of the importation, it would seem that no injustice is done in permitting the board to act upon the information thus obtained.

It is said that the board never acquired jurisdiction of the subject matter in this instance. We do not agree with this contention, and we think counsel for the importer mistakes the holding of the court in *Tilge v. United States* (2 Ct. Cust. Appls., 149; T. D. 31676). The subject matter of this appeal is the reappraisement of the goods covered by this appeal. There can be no doubt that under the law and upon the importer's own appeal Board 2 acquired jurisdiction of this subject matter. It would not do for the importer to say that it did not at the same time acquire jurisdiction of the parties, for the importer was himself the party that invoked the jurisdiction. Having jurisdiction of the subject matter and of the parties, that jurisdiction may be lost if the board proceeds upon a wrong principle in reaching its conclusion. Such is not, however, this case. It is true that it does not appear that 1 package in 10 was examined by the board in some instances. But it does appear that the board had the opportunity to examine such samples as they saw fit to draw—in fact, drew such samples—from the importation, and, finally, it appears by the testimony of General Appraiser Howell that after taking the evidence in the reappraisement case General Appraiser Howell, in company with the importer and his attorney, drew additional samples, to which no objection was taken. The classification board found as a fact that the evidence clearly shows that the board had before it ample and sufficient samples of all the merchandise under reappraisement. We think, in view of this finding, that the substitute procedure which the law admits, as intimated in *Tilge v. United States* (2 Ct. Cust. Appls., 149; T. D. 31676), was followed, and that there was no want of jurisdiction. If there was an error on the part of the local appraisers by failure to examine 1 in 10 of the packages, we agree that the rule laid down in *Burgess v. Converse* (4 Fed. Cas., 726), that if the importer demands a reappraisement, and that reappraisement is regular, he waives all objections to the action of the local appraiser. See also *Beer v. United States* (1 Ct. Cust. Appls., 484; T. D. 31526).

It is next claimed that the reappraisement board proceeded upon the wrong principle and contrary to the law in not following and regarding the case of *Gulbenkian & Co. v. United States* (153 Fed. Rep., 858) as controlling. It was sought to show before the classification board that it has been the uniform custom in the principal

markets of the country whence the goods were imported to buy and sell goods like these in question, colored and whites mixed, at one and the same price, and it was claimed that under these conditions the customs officials, including the three general appraisers, erred and acted unlawfully in appraising the wool separately. It is claimed that the Georgian autumns, colored and whites mixed, should have been inventoried at one and the same price. This testimony was excluded by the classification board, and properly so. It is not the province of the classification board to retry the question of fact determined by the board of reappraisalment. This was held by this court in *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217) and reaffirmed in *Briggs v. United States* (1 Ct. Cust. Appls., 408; T. D. 31482). That this testimony was an effort to retry that question is obvious. But more than this, the goods were separately invoiced, and there was sufficient before Board 2 to indicate that they were purchased at separate prices. The real contest appears to have been whether the goods were properly graded by the invoice.

The importer himself did not pursue the course indicated in the *Gulbenkian case, supra*. In that case the wools were all invoiced at the same price, and evidence was introduced before the classification board showing conclusively that, according to the uniform custom, the wools were sold at a single price in the country of production. That fact is not established in the present case.

It should be stated that the testimony offered in the *Gulbenkian case, supra*, appears not to have been supplemental testimony, simply making weight for the importer, but the only testimony bearing upon the question of the custom in selling wools in the country of exportation, which was shown by the conclusive testimony to be the method claimed by the importer, as it would appear from the opinion of Judge Coxe that the record was destitute of any evidence that the wool was bought and sold in the country of exportation in any other way than as claimed by the importer.

In the present case there was abundant testimony before Board 2 tending to show that the goods were sold as claimed by the Government.

Before the reappraisalment board affidavits of three Marseille merchants were offered to the effect that certain samples of wool submitted to them were of the B O and B O O character; that is, of a grade higher than that fixed by the importer in his invoice. Complaint is now made that this testimony was improperly admitted by the board of reappraisalment. When these affidavits were offered, they were accompanied by the statement:

The first I offer as an exhibit is the Government's Exhibit 1, sample of wool said to be representative B wool from all of the invoices on hearing, subject to objection of course. Of course, if it proves that it is not a proper subject I offer it for what it is worth.

Importer's counsel then said:

I presume it will be a matter of proof afterwards?

To which counsel for the Government replied:

Oh, yes; I have got to establish that. Also I have to establish that that is a fair sample. I expect to do that.

Later Mr. Wakefield, attorney for the Government, testified:

I further testify that the sample of wool sent to Marseille was received by me from Mr. Seavers and delivered to Special Agent Clayton to be transported to Marseille, and that I received the sample by mail from the department on its return, and that during the time it was in my hands it underwent no change whatsoever.

By Mr. WASHBURN. You know that Special Agent Clayton is in the city, don't you?—A. He called me up on the phone yesterday. I tried to get him here. He delivered the sample to the special agent in Paris.

Mr. WAKEFIELD. If there is any objection to the validity of that sample, or that it was not properly connected, I don't think it possible to connect it by competent legal evidence, and I would request the board to forward a representative sample of the B wool to Marseille directed to these brokers, with the request for a statement. That is the only way we can get competent strict evidence.

Mr. WASHBURN. I object to that. I shall decline to admit that it has been shown that Exhibit 7 is a competent sample.

It was contended before the classification board that the admission of these affidavits was error sufficient to oust the appraisement board of jurisdiction. Assuming that this is all that appeared in the case, it is not to be assumed that the board considered these affidavits as establishing any fact made the subject of controversy, particularly as it was conceded by the Government's attorney that he had not made proof showing that the samples attached were like the samples of wool actually adopted. The samples were returned with the affidavits, and were before the board, and it is not impossible that they by examination could determine that these samples corresponded with the samples of wool which they had determined was the character of the importation. It is not claimed by the Government that the samples were shown by the evidence to be correct samples, but it is claimed that by comparison with the other samples of wool which the board has before them they may have been able to determine that such was its quality.

There was no motion to strike out this evidence for the very adequate reason that the attorney for the Government did not *claim* that he had established sufficiently the fact that the sample was taken from the goods. It would be an anomaly to hold that testimony having been received before the board of appraisement without objection, no motion having subsequently been made to strike it out, the action of the board in receiving this testimony could on review be held error and the entire proceeding vitiated because of such action, when the attention of the board had not been challenged to any such view of the case on the reappraisement proceeding. This testimony was, so far as the objection now urged by counsel goes, competent for the purpose of showing that wool of the character

shown by the samples attached to the affidavits was B O or B O O wool. If there was any error it was in failing to supplement the proof by showing that the samples attached to the affidavits corresponded with the wool in question in this importation, and, as indicated above, a comparison of the wool shown to be the subject of importation with the samples would enable the board to form some judgment upon that question.

The question of whether they gave improper weight to any of the evidence before them is not the subject of review by the board of classification or this court. *Wolff v. United States* (1 Ct. Cust. Appls., 181; T. D. 31217); *Beer v. United States* (1 Ct. Cust. Appls., 484; T. D. 31526).

We do not discuss the rulings upon evidence offered for the purpose of showing that this proceeding was an open hearing, as we have treated it in our discussion as an open hearing.

We find no error in the ruling of the classification board, and their decision is *affirmed*.

DE VRIES, Judge, did not sit in this case.

STEINHARDT & BRO. v. UNITED STATES (No. 536).¹

NEEDLE BOOKS, CONTAINING NEEDLES, AND THE LIKE.

Needle books, containing needles, and the like articles are not dutiable as manufactures in chief value of metal. Paragraph 164, tariff act of 1909, singles them out and establishes a rule for the determination of their dutiable status, and that is according to the chief components included within and going to make up the entirety. The importations were dutiable as nonenumerated manufactured articles under the provisions of paragraph 480, tariff act of 1909.—*Hartman v. Sheppard* (125 U. S., 337).

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7119 (T. D. 31026).

[Reversed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal involves the construction of the final clause of paragraph 164 of the tariff act of 1909, which reads:

164. * * * Needle cases or needle books furnished with assortments of needles or combinations of needles and other articles, shall pay duty as entireties according to the component material of chief value therein.

The merchandise consisted of needle books of hand sewing and darning needles, bodkins, scissors, and buttonhooks. The books are made up of paper, designed and adapted for holding needles. The storing of the needles therein appears to be a matter of some skill, as they are arranged in a definite order according to sizes and

¹ Reported in T. D. 32092 (21 Treas. Dec., 709).

numbers. They were assessed for duty by the collector under paragraphs 199, 420, and 452 of that act, according as these paragraphs were applicable in the view taken by the collector.

The only claim asserted by the importer, appellant, necessary of consideration in our view of the case, is that the goods are included within the terms of paragraph 633 of said act, for "needles, hand sewing and darning," and therefore dutiable as nonenumerated manufactured articles under paragraph 480 of the act.

It was admitted at the hearing that the chief value of the merchandise resided in the needles, and the appeal was expressly limited by the appellant to the cases containing only hand-sewing needles. The subject matter of decision, therefore, is an entirety, consisting of needle cases filled with hand sewing needles, the cases being made entirely of paper and the needles of steel, and as between the two, the chief component material of value being the needles.

The Government contends, and the board held, that the merchandise is properly dutiable as manufactures in chief value of metal. The appellant contends that under the peculiar language of paragraph 164 the merchandise is not so dutiable, because the component material of chief value of the entireties is hand sewing needles, which are precisely within the provisions of paragraph 633 of the free list, and not otherwise provided for in the act.

The exact distinction contended for is that needles are a separate tariff entity from the metal of which they are made, so denominated in paragraph 633, and so expressly assigned for duty under the proviso under consideration. Paragraph 480 in terms confines "component material of chief value" to each *single* component *material*. This *proviso* carves out an exception to that rule and provides for the ascertainment of duty according to a component material of chief value consisting of "articles" made up of several single component materials.

The dutiable classification of needle cases filled with needles has been the subject of extended litigation and conflicting decisions. See *Wanamaker v. Cooper* (69 Fed. Rep., 465), *United States v. Mathews* (78 Fed. Rep., 345), *Guthman v. United States* (148 Fed. Rep., 332; T. D. 27501), *Dieckerhoff v. United States* (151 Fed. Rep., 957; T. D. 27949), *United States v. Dieckerhoff* (160 Fed. Rep., 449; T. D. 28716).

The decision in this case depends entirely upon the construction to be given the phrase "as entireties according to the component material of chief value therein." The philosophy of the board applicable to the case is expressed as follows:

That it is necessary to draw a line between component *parts* as distinguished from component *materials* appears to us to be unquestioned.

While the reasoning of the board, as applied to the general provisions of paragraph 481 of the tariff act of 1909 for the ascertainment of the component material of chief value of manufactured articles is without question, we do not consider that it is applicable to

the case at bar. The cases cited by the learned general appraisers, and the instances, subject of comment, relating to manufactured articles in exposition of the rule of ascertainment of component material of chief value and applied by the board in this case, is expressly by statute confined to articles, and not to entireties made up of articles, and relates to the component material of chief value of such articles, the same having been manufactured. Not relying upon this provision in instances of needle cases, and obviously intending a different rule, the Congress has singled out such and laid down a special rule for the determination of dutiable value to be ascertained according to the chief component article included within and going to make up the entirety.

Under the rules of grammatical and legal reference the words "component material of chief value therein," as used in the provision of paragraph 164, are referable to the word "entireties" preceding. The statute speaks in this case of the chief component material of an *entirety*, and not the chief component material of an *article* or *manufacture*. The courts, notably in *United States v. Dieckerhoff* (160 Fed. Rep., 449), had held that needle cases filled with needles could not be spoken of as articles composed wholly or in part of metal. The court said, speaking through Judge Lacombe:

The case itself is composed of paper, and the suggestion that, when needles are stored in it, it becomes an article composed in part of metal, seems about as reasonable as would be the proposition that a square pasteboard box becomes an article composed in part of rubber when it is filled with rubber bands.

The component materials which were immediately assembled in the making up of this entirety, the merchandise in its assembled and imported condition, which the statute denominates an entirety, was made of needles and books of paper. In the specific instance the statute makes an article a component material of an entirety. The component materials, therefore, of *these entireties* are needles and books of paper. If, therefore, the needles are the component material of chief value, the entirety is dutiable according as the needles therein are dutiable. In this instance such needles are free *eo nomine*. Were the books of paper the component material of chief value in the entirety the articles would be dutiable in the manner such books of papers are made dutiable under the tariff laws.

There is, in the opinion of the court, nothing unreasonable or impossible of administration in this conclusion, and there is nothing in the instances suggested in the opinion of the board that militates against this statement or renders administration of the customs laws hereunder either impossible or unreasonable.

Congress having specifically provided in this instance that the dutiable integers should be a component material consisting of an article of manufacture, the reasoning in and conclusion of this case does not carry it beyond the language employed by the Congress.

The chief component article, hand sewing needles, which is the chief component material of the entirety in this case, being specifically

provided for in the free list, paragraph 633, the case is controlled in principle by *Hartranft v. Sheppard* (125 U. S., 337). The subject of that decision was quilts composed of cotton and eider down or silk and eider down, the eider down in each case being the component material of chief value. The court said:

Quilts are nonenumerated manufactured articles, composed of two or more materials. Eider down is on the free list. * * * As eider down is the component material of chief value in the quilts involved in this suit and that is free, it follows that they are manufactured articles not provided for, and therefore chargeable with the duty of 20 per cent ad valorem under section 2513 rather than 35 per cent as a manufacture of cotton or 50 per cent as a manufacture of which silk is the component material of chief value.

Dieckerhoff v. United States (T. D. 27949; 151 Fed. Rep., 957).

The merchandise is properly dutiable, therefore, as a nonenumerated manufactured article under the provisions of said paragraph 480.

For the reasons herein stated we think the Board of General Appraisers erred, and the decision of the board should be *reversed*.

DOWNING & Co. v. UNITED STATES (No. 594).¹

PULP IN SHEETS MADE FROM COTTON OR LINEN RAGS.

Previous to the present enactment the board had in several opinions construed "manufactures of cotton," and there is a strong presumption that that construction was adopted in the law as it is. Pulp made of cotton rags or linen rags by processes that do not destroy the integrity or strength of the fibers has undergone no such chemical change as would make these goods dutiable by similitude; the pulp was rightly held dutiable, according to the material, as a manufacture of cotton under paragraph 332, or as a manufacture of flax under paragraph 358, tariff act of 1909.

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7156 (T. D. 31235).

[Affirmed.]

Brown & Gerry for appellants.

Wm. K. Payne, Deputy Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The importation in this case consists of sheets of pulp made from cotton rags and linen rags. The process of manufacture is described as follows: The rags, after being sorted, are cleaned and cut; then they go into boilers and subsequently into beaters to be beaten up into a soft fiber; next they are bleached, and finally sent to a drying machine and put into sheets or rolls. This rag pulp as imported is intended to be made into paper of a high quality.

The Board of General Appraisers found that in paper making from pulp the object sought is to draw out of the rags the fibers in a very fine state while preserving their strength as far as possible; that it is

¹ Reported in T. D. 32093 (21 Treas. Dec., 712).

the "tissue" resulting from the deposition of the fibers on wire cloth while suspended in water that we know as, and term, paper; that the strength and integrity of the fibers determine the quality of the paper; that the rags are broken and pulped, but that neither the mechanical nor the chemical treatment thereof breaks or destroys the fiber itself.

The importation in this case was assessed for duty at 30 per cent ad valorem under the provisions of paragraph 415 of the tariff act of August 5, 1909, as paper not specially provided for. It was held by the Board of General Appraisers to be dutiable at 45 per cent ad valorem as manufactures of cotton or as manufactures of flax, it being immaterial as to whether the component material of chief value was flax or cotton, as if in chief value of cotton, it would be dutiable under paragraph 332, and if in chief value of flax, under paragraph 338, at the same rate, namely, 45 per cent ad valorem.

The claim made by the importer is that the importation is dutiable by similitude to wood pulp under paragraph 406 by authority of the similitude clause in paragraph 481. Paragraph 406 provides for mechanically ground wood pulp and chemical wood pulp. It is conceded that this should be given the higher rate of duty, namely; one-fourth of a cent per pound imposed on chemically ground wood pulp bleached. The question, therefore, is whether the importation is provided for in the tariff act by either paragraph 352 or paragraph 358, dependent upon which material (cotton or flax) is of chief value, or whether it is to be treated as a nonenumerated manufactured article and therefore dutiable by similitude to wood pulp.

While the dutiability of this material as cotton or flax has never been determined by the courts other than by the Board of General Appraisers, it has had consideration in three cases by the board. In the matter of the protest of J. W. Hampton, jr., & Co., G. A. 1866 (T. D. 13594), the subject of the protest was bleached cotton pulp, dried in sheets or cakes, to be used for filtering purposes. It was returned by the appraiser as a manufacture of cotton, and assessed for duty at 40 per cent ad valorem under paragraph 355 of the act of 1890. It was claimed to be dutiable as manufactures of wood or other pulp. It was found that the article in question was itself cotton pulp and not an article manufactured from or of cotton pulp, and being a manufacture of cotton, it was held to be properly assessed for duty by the collector.

In the matter of the protest of Hugo Reisinger, G. A. 2414 (T. D. 14692), certain pulp was assessed for duty at 40 per cent ad valorem as a manufacture of cotton under paragraph 355 of the tariff act of 1890. It was claimed to be free, as paper stock, crude; or, if dutiable, at 20 per cent under section 4 as a nonenumerated manufactured article; or at 25 per cent, as a manufacture of paper under paragraph 425; or at 35 per cent, as a manufacture wholly or chiefly of wood

under paragraph 461. The board found the merchandise to be composed of cotton, flax, and wood, cotton the component material of chief value, and that it was not crude paper stock; and found that cotton, being the component material of chief value therein, the same was dutiable as a manufacture of cotton under paragraph 355.

With this construction of the term "manufactures of cotton" before it, Congress enacted the present statute, and a strong presumption arises that the term is used in the present act in the sense in which it had been interpreted by the board.

It is claimed, however, that in principle the question had been otherwise decided by the courts, and the case of *Meyer v. Arthur* (91 U. S., 570) is relied upon as a leading case upon the subject. In that case the question presented was whether white lead, nitrate of lead, oxide of zinc, and dry orange mineral are manufactures of metal within the meaning of the act of August 1, 1872, levying duties upon the manufactures of metals, or of which the metals, or either of them, is the component material of chief value. In that case the products in question were the products of metals which had undergone a chemical change and which had become something else than metals. Their characteristics as metal had disappeared. The metal had completely lost its identity and become a different mineral species.

In the present case the paragraph imposing a duty upon the manufactures of flax, hemp, ramie, or other vegetable fiber clearly indicates that the preservation of the fiber is sufficient to bring the article within the general term, "flax, hemp, or ramie." We think the same thing can be said of cotton, under paragraph 332, that it is the cotton fiber which is the crude cotton meant by the paragraph. In the present case, as the finding of facts indicates, the fibers of the cotton are retained. It is true they are cut somewhat; but the strength and integrity of the fibers determine the quality of the paper. It can not be said that they have disappeared or undergone a complete chemical change, as was the case in *Meyer v. Arthur*.

The case *T. D. 27866* is cited as sustaining the contention of the importers. In that case the question was whether sawdust was a crude article used in dyeing within the meaning of the tariff act. The assessment was for waste not specially provided for. No question appears to have been raised as to whether sawdust was a manufacture of wood, and the case therefore is not in point. On the other hand, ground particles of wood, or wood flour, produced intentionally by the grinding operation, have been held to be dutiable as a manufacture of wood. *Goldman v. United States* (87 Fed. Rep., 193); *Nairn Linoleum Co. v. United States* (151 Fed. Rep., 955).

The importers also cite the case, *G. A. 1128 (T. D. 12356)*. The question there was whether a pulp produced from straw and reduced to fibers by beating or cutting with knives was dutiable as a manufacture of straw. It was held that the pulp, presenting none of the dis-

tinguishable characteristics of straw, was not to be classified as a manufacture of straw, and was dutiable by similitude to chemical wood pulp bleached.

The case is distinguishable from the present in that the fibers of the straw were not of crude material within the intent of the tariff act, while the fiber of cotton and of flax is the crude material, within the meaning of paragraph 332 and paragraph 358, respectively; and, as the board in the present case finds that the fibers are still retained to the extent at least that they perform an important office in the use of the article produced and imported, we are unable to say that they have lost their identity, as was the case of the article involved in T. D. 12356.

A further contention is made by counsel for the importer, which is that Congress having distinguished in prior acts between cotton and flax and pulp as components, merchandise like that at bar, which is in the form of pulp, can not be considered as a manufacture of cotton or flax, and attention is drawn to the fact that in paragraph 461 of the tariff act of 1890, paragraph 353 of the tariff act of 1894, and paragraph 433 of the tariff act of 1897 are found provisions for manufactures of wood or other pulp, and in paragraph 447 of the tariff act of 1909 provision is made for the manufactures of pulp generally. It is said that articles made out of the merchandise, the subject of the importation in this case, such as statuettes or trays, would be dutiable under this provision, although the material itself is not, and that these provisions for manufactures of pulp, when considered in connection with coexistent provisions for manufactures of cotton or flax which are found in the various tariff acts, indicate very clearly that, to the mind of Congress, pulp is a substance distinct from cotton or flax.

We do not see how this conclusion should follow from the premises. The fact that articles made from pulp might be dutiable at a different rate is no more significant than that articles made from cotton cloth might be dutiable at a different rate than is imposed upon the manufactures of cotton had Congress seen fit to provide *eo nomine* for such articles made up from cotton cloth.

The cases cited to support the contention of counsel do not support the view contended for. The cases are *Blumenthal v. United States* (144 Fed. Rep., 384) and *Seeberger v. Cahn* (137 U. S., 95). In one of these cases the court was dealing with contrasting provisions in the same act, and it was held that in the acts in question in the one case Congress had erected a distinction between glass and paste and in the other between worsted and wool. In the present case the sole question is whether the product here in question is a manufacture of cotton or flax, and the fact that a provision is made for articles which might be made out of such manufactures of cotton, naming it as pulp, does not aid in determining whether the article in question, while it remains pulp, is in fact a manufacture of cotton or flax.

We think no error was committed by the board in determining the importation in question to be dutiable as manufactures of cotton or flax, and the decision of the board is therefore *affirmed*.

DE VRIES, Judge, did not sit in this case.

UNITED STATES *v.* FENSTERER & RUHE (No. 620).¹

MAGNESIA RINGS, SUSCEPTIBLE OR NOT OF DECORATION.

Reviewing the pertinent clauses of the former and of the present law, there appears no reason to hold the new law necessitates a new ruling as to the dutiable value of magnesia rings used for holding in place the incandescent mantles of gas burners; they were properly held dutiable at 35 per cent ad valorem under paragraph 95, tariff act of 1909, as articles composed wholly or in chief value of earthy or mineral substances, not specially provided for and not decorated, whether susceptible of decoration or not.—*Fensterer & Ruhe v. United States* (1 Ct. Cust. Appls., 93; T. D. 31110).

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24819 (T. D. 31300).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of magnesia rings used for holding in place the incandescent mantles of gas burners. The importation was made under the tariff act of 1909, and the articles were classified by the collector as "manufactures of bisque, undecorated," and were assessed at 55 per cent ad valorem under the provisions of paragraph 94 of that act.

The importers duly filed their protest to this classification and contended that the merchandise should be assessed at 35 per cent ad valorem under paragraph 95 as articles composed wholly or in chief value of earthy or mineral substances, not specifically provided for and not decorated, whether susceptible of decoration or not.

The protest was heard by the Board of General Appraisers, and the same was sustained by the board. The Government now seeks a reversal of that decision.

There was no evidence taken before the board, and there are no exhibits filed. However, the parties agree that the merchandise in question is exactly similar to that involved in the case of *Fensterer & Ruhe v. United States* (1 Ct. Cust. Appls., 93; T. D. 31110). In that case the articles are described as bisque rings designed for incandescent burners, undecorated and insusceptible of decoration. This description is therefore accepted as correct in this case.

¹ Reported in T. D. 32094 (21 Treas. Dec., 716).

The importation in the case just cited had entered under the tariff act of 1897. The collector classified the wares as *bisque* and assessed duty upon them at 55 per cent *ad valorem* under the provisions of paragraphs 95 and 96 of that act. The action of the collector was sustained by the Board of General Appraisers. But on appeal this court held that the articles did not come within those paragraphs and that they were properly dutiable only at 20 per cent *ad valorem* under section 6 of the act as nonenumerated manufactured articles.

The following is a copy of paragraphs 95 and 96 of the tariff act of 1897, and also of the cognate paragraph 97, which will be hereinafter referred to:

95. China, porcelain, parian, *bisque*, earthen, stone, and crockery ware, including clock cases with or without movements, plaques, ornaments, toys, toy tea sets, charms, vases and statuettes, painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem*; if plain white and without superadded ornamentation of any kind, fifty-five per centum *ad valorem*.

96. All other china, porcelain, parian, *bisque*, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem*; if not ornamented or decorated, fifty-five per centum *ad valorem*.

97. Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum *ad valorem*; if decorated, forty-five per centum *ad valorem*.

As has been stated above, in the former *Fensterer & Ruhe* case this court held that articles identical in character with these were not included within the provisions of any of the foregoing paragraphs. The reason for this decision, briefly stated, was that the provisions of the paragraphs prescribing a given duty if the wares were decorated and a less duty if they were not decorated necessarily implied that the wares must all be such as might be decorated; that is, such as were susceptible of decoration. Inasmuch as the goods in question were found as a matter of fact to be incapable of decoration they were held to be foreign to the paragraphs and were assessed as non-enumerated manufactured articles. This decision rested upon the authority of *Dinglestedt v. United States* (91 Fed. Rep., 112), decided in 1898, and *United States v. Downing* (201 U. S., 354), decided in 1906.

The goods now in question were imported under the present tariff act. They were classified by the collector as *bisque* wares undecorated, and assessed at 55 per cent *ad valorem* under the paragraphs of that act which correspond to paragraphs 95 and 96 of the prior act, as above copied. This ruling was, of course, made upon the theory that the present paragraphs differ from the former ones so as to include such articles which the former paragraphs, accord-

ing to this court's decision, did not include. The Board of General Appraisers, however, in this case held that the difference in language of the corresponding paragraphs was not such as to justify this classification, and that the reasons and authority of the former *Fensterer & Ruhe* decision still govern such wares under the new paragraphs. This is the decision which the Government now appeals to this court, and the only question in the case is whether or not the decision made by this court respecting these articles under the former act still controls them under the corresponding paragraphs of the present act.

The following is a copy of paragraphs 93, 94, and 95 of the act of 1909, being the paragraphs corresponding to those above copied from the act of 1897:

93. China, porcelain, parian, bisque, earthen, stone and crockery ware, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware; painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, sixty per centum ad valorem.

94. China, porcelain, parian, bisque, earthen, stone and crockery ware, plain white, plain brown, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, and lamps, all the foregoing wholly or in chief value of such ware, not painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, fifty-five per centum ad valorem.

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem; carbon, not specially provided for in this section, twenty per centum ad valorem; electrodes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, thirty per centum ad valorem.

The Government contends that two important changes appear in the phraseology of the new paragraphs. First, the word "otherwise," used in the earlier paragraph in connection with the words "decorated or ornamented," has been dropped from new paragraphs 93 and 94; and, second, at the close of both 93 and 94 are added the words "and manufactures in chief value of such ware." The Government argues that these changes of language are sufficient to show a legislative purpose to include such wares within the provisions of the new paragraphs, whether susceptible of decoration or not.

In answer to this it may be said that the omission of the word "otherwise" from the new paragraph does not seem to touch upon the matter in hand. That word did not enter into the former decision of this court in this matter. It had, indeed, an important place in the former act in determining the construction to be given the words "painted, tinted, stained, enameled, printed, or gilded," as therein used; but it had no relation to the question whether or not the wares therein described must be capable of decoration. That is, the use of

the word "otherwise" implied that the words "painted," etc., were intended to cover only such as was decorative or ornamental in character and effect; but it did not enter into the construction which held that the wares must be capable of decoration in order to come within the meaning of the paragraphs. It may furthermore be said that the addition of the words "and manufactures in chief value of such wares" does not seem to affect the present inquiry. This provision did, in fact, substantially appear in former paragraph 96, and therefore is not wholly new. And besides that, it does not bear upon the question at issue.

Therefore the decision of the board in overruling the classification made by the collector was correct. And this is further sustained by the change in language between paragraph 97 of the former act and the corresponding paragraph 95 of the present act. This latter paragraph provides for articles composed of earthy or mineral substances not specially provided for, not decorated, whether susceptible of decoration or not. This last provision, "whether susceptible of decoration or not," is new in the act, and appears to be the unmistakable legislative answer to the same question raised by protests filed under the former act. The principle involved is thus recognized, and appropriate words are used to place such articles as are not susceptible of decoration under the new paragraph 95, leaving the preceding paragraphs to continue within the rule expressed in the former case. The decision of the board placing the articles at bar within paragraph 95 of the present act is therefore approved and the same is *affirmed*.

FURUYA & Co. v. UNITED STATES (No. 668).¹

LEAKAGE OF RICE WINE OR SAKE.

In the past there has been much contention over sake and the leakage of sake, but the tariff act of 1909 would seem, by providing in paragraph 307 for rice wine or sake expressly and forbidding any allowance should be made for breakage, leakage, or damage on wines, to have placed the question beyond doubt. It was properly held, as here, no such allowance should be made on sake.

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25232 (T. D. 31478).

[Affirmed.]

John Giblon Duffy for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellants imported into this country a shipment of sake, which is an alcoholic beverage manufactured from rice.

¹ Reported in T. D. 32095 (21 Treas. Dec., 720).

The collector held the importation to be dutiable under paragraph 307 of that act and assessed duty accordingly. There is no controversy concerning that classification or the rate of duty assessed by the collector. The importers, however, objected to the quantity upon which the collector computed the assessment. The collector assessed duty upon the entire quantity of sake which had been shipped, as shown by the invoice, whereas the importers alleged that part of the contents of the casks had been lost by leakage while in transit. The importers contended that no duty should be demanded for such part of the original exportation as had failed, because of this leakage, to reach port. The importers filed their protest against the assessment on that ground. This protest was heard by the Board of General Appraisers, and the same was overruled. The importers now pray for a reversal of that decision of the board.

The pertinent parts of paragraph 307 of the act of 1909 read as follows:

307. Still wines, including ginger wine or ginger cordials, vermouth, and rice wine or sake, and similar beverages not specially provided for in this section, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty-five cents per gallon; * * * *And provided further:* That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. * * *

The present tariff law is the first one which has fixed a rate of duty to be levied upon sake *eo nomine*. Under former acts that article was the subject of much litigation and there are many reported decisions relating to it. However, in the act of 1909, as appears by the above copy, sake was placed by name in the still-wine paragraph, and is therein called rice wine or sake. It nowhere distinctly appears that these two names apply only to the same identical article; that is, that they are exact synonyms. There may, indeed, be other kinds of rice wine besides sake; but the language of the act and the references to the article appearing in published cases make it safe to assume that the term "rice wine" at least includes sake, and that it is so used in the paragraph. As appears above, there follows in the same paragraph an express provision that there shall be no constructive or other allowance for leakage on wines. The question therefore arises whether there can be any allowance under the act for leakage of sake in transit in view of the provision that there shall be no allowance for leakage on wines.

Sake is made from rice by a process of fermentation, and grapes do not enter at all into its composition. In the ordinary use of terms, therefore, sake would not be called a wine. Under prior tariff acts it was held to be dutiable by similitude at the same rate as still wines. But in the present act it is specially placed within the still-wine paragraph and expressly named therein as a wine. In the

nomenclature adopted by the paragraph, therefore, it becomes a kind of wine, whether it would ordinarily be so designated or not. This description of sake as a kind of wine is followed in the paragraph by the provision that there shall be no allowance for leakage on wines. It seems, therefore, to be a reasonable and natural interpretation of these provisions taken together to hold that one of the wines on which there shall be no allowance for leakage is the kind of wine also called sake, which is expressly named as a wine in the preceding recital of the paragraph. This seems, indeed, to be the very purpose for which the name rice wine was used in the paragraph, for there was otherwise no need of making the meaning of the word sake more definite by the use of such an explanatory alternative name. In the tariff vocabulary of mercantile terms sake had come certainly to have even a prominent place; there was no uncertainty as to the article to which that name applied. The alternative name, rice wine, therefore, seems to have been used for the purpose of adding that much to the original meaning of the term, namely, that for the purpose of the paragraph sake was to be considered as a kind of wine and to be included within any of its provisions which applied generally to wines.

This view finds support in the fact that under the act of 1897 there was much controversy as to whether this inhibitive provision applied to sake when that article was made dutiable as a still wine under the paragraph by similitude only. The Government then contended that the provision applied to sake; the importers contended that it did not. The importers argued that, even though sake was assessed as a still wine by similitude, nevertheless it was not actually a still wine, nor was it in fact a wine at all, and that the proviso prohibiting any allowance for leakage on wines should not be extended to it by implication or construction. The application of the term wine to the article in the present act seems to be an avoidance of this contention, for it shows a legislative purpose to place the article in the paragraph as a wine, subject to the general provisions relating to wines therein.

The appellants cite the vermuth case, *United States v. Wile* (178 Fed. Rep., 269) as an authority in support of their contention in this case. In that case it was held that the proviso now in question did not apply to vermuth, which is an article included *eo nomine* within the still wines paragraph of the act of 1897, as it is also in the present act. Appellants contend that the same reasoning which prevented the application of the inhibitive provision to vermuth would also prevent its application to sake. However, in the cited case the court held that vermuth was neither wine, liquor, cordial, nor distilled spirits, nor was it named as such in the paragraph, but rather that it was named therein as *sui generis*, and therefore that it did not come within the terms of the proviso, which related only to

wines, cordials, liquors, and distilled spirits. But, as appears above, in the act of 1909 sake is denominated a wine in paragraph 307, and this is the paragraph which contains both the duty and the proviso. It is true that it is called rice wine or sake, and the claim may be made that the proviso applies only to wines which may be called such without further description or explanation. But, on the other hand, the term wines contained in the proviso is comprehensive and unqualified, and it is not a forced interpretation which makes it include all articles called wines by the terms of the same paragraph and in relation to the same general subject matter.

The decision of the board holding that no allowance is permitted by the act of 1909 for the leakage of sake while in transit is therefore approved; and the same is *affirmed*.

PERRY, RYER & Co. v. UNITED STATES (No. 669).¹

1. YOUNG FUSTIC DYEWOOD UNDER TARIFF ACT OF 1897.

Young fustic dyewood, cut or shredded into pieces, suitable to be packed in burlaps for shipment, has been thereby advanced in condition. The statutory provision of the act of 1897 relating to an advance in condition is unqualified and the importation of corresponding date was dutiable under paragraph 20 of that act.

2. YOUNG FUSTIC DYEWOOD UNDER TARIFF ACT OF 1909.

But paragraph 559, tariff act of 1909, expressly provides for the free entry of such an importation, if not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of it. This is the case here, and the rule of *stare decisis* does not apply. The importation of corresponding date was free of duty under tariff act of 1909.

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25204 (T. D. 31450).

[Affirmed as to part and reversed as to part.]

Searle & Pillsbury (Wm. E. Waterhouse of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case consists of young fustic dyewood. The appellants imported considerable quantities of this wood both under the tariff act of 1897 and that of 1909. The protests brought before the court in this case involve shipments under both acts.

The collector classified the importations as drugs, namely, woods used expressly for dyeing, advanced in value so as to be dutiable under paragraph 20 of each act, and in accordance with this ruling the merchandise was duly assessed. The importers protested against that classification and contended that the importations should

¹ Reported in T. D. 32096 (21 Treas. Dec., 722).

properly be classified as drugs, namely, woods used expressly for dyeing, and not advanced in value or condition, and that as such they should be severally entitled to free entry under favor of paragraph 548 of the act of 1897 and paragraph 559 of the act of 1909. These several protests were heard together upon evidence by the Board of General Appraisers and were overruled. The appellants now pray for a reversal of the board's decision.

Inasmuch as the decision of this case depends in part upon the application of the several paragraphs above cited, they are here copied in full for convenience of reference.

Act of 1897:

20. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible, but which are advanced in value or condition by refining, grinding, or other process, and not specially provided for in this act, one-fourth of one cent per pound, and in addition thereto ten per centum ad valorem.

548. Drugs, such as barks, beans, berries, balsams, buds, bulbs, and bulbous roots, excrescences, fruits, flowers, dried fibers, and dried insects, grains, gums, and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, and stems, spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process, and not specially provided for in this act.

Act of 1909:

20. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing or tanning; any of the foregoing which are natural and uncompounded drugs and not edible, and not specially provided for in this section, but which are advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture, one-fourth of one cent per pound, and in addition thereto ten per centum ad valorem: *Provided*, That no article containing alcohol, or in the preparation of which alcohol is used, shall be classified for duty under this paragraph.

559. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums, gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing or tanning; any of the foregoing which are natural and uncompounded drugs and not edible and not specially provided for in this section, and are in a crude state, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture: *Provided*, That no article containing alcohol, or in the preparation of which alcohol is used, shall be admitted free of duty under this paragraph.

There are at least two kinds of fustic wood imported into this country for use in dyeing. One grows in the West Indies and in South America. It attains the growth of large trees and is imported in sticks 4 to 6 feet in length and 14 to 16 inches in diameter, weighing about 8 sticks to a ton. The wood of this species is cut up and the dye extracted under pressure, the trunk of the trees being the part most valuable for this purpose. The color obtained from this material is a clear yellow and is mostly used in dyeing cotton and woolen goods. This species of fustic is not involved in this case, and its description is brought upon the record by the appellants only to prevent the present importation from being mistaken for it by reason of their identity of names.

The fustic composing these importations is called "young fustic" and grows only in the eastern Mediterranean countries. It is exported at Trieste, in Austria. It grows only as a shrub or stunted, irregular tree. The roots and branches are the valuable parts of the plant as dyewood, the trunks furnishing but little such extract. The dyeing material is extracted from the wood by boiling it in an open vat; the color produced from it is a greenish yellow. The dye is almost exclusively used in coloring glove leather, and probably 80 per cent of all the young fustic imported into this country is used for that purpose by the glove industries in Fulton County, N. Y.

As has been stated, the wood in question comes from a shrub or small tree, and the roots and branches are the parts which are richest in dyeing properties. These roots and branches are generally gnarled, irregular, and jagged in shape, and before shipment the wood is reduced in size by a process of cutting or shredding. The material resulting from this process is packed in coarse burlap sacks and in that shape is brought into this country.

There is some dispute in the testimony as to the average size of the pieces which finally result from the shredding process and which make up the importations. The official sample is contained in a glass bottle and is composed in most part of pieces as small as filberts. On the other hand, the appellants dispute the correctness of this as a fair sample and in turn produce exhibits which contain pieces of mixed sizes, some being as small as the official sample, while others are slivers of much greater size.

The decision of this case depends entirely upon the construction and effect which is to be given to the process of cutting and shredding the wood as above referred to. The Government contends that this treatment, whereby the wood is reduced in size, takes it out of the free paragraphs above quoted and places it within the dutiable ones. On the other hand, the importers contend that the wood is entitled to free entry notwithstanding the fact that it is reduced in size before importation.

In as far as the importations are controlled by the act of 1897 there does not seem to be much room for controversy. Paragraph 20 of that act fixes a duty upon "drugs, such as * * * woods used expressly for dyeing, * * * which are advanced in value or condition by refining, grinding, or other process." And paragraph 548, the correlative paragraph of the same act, provides for the free entry of "drugs, such as * * * woods used expressly for dyeing * * * not advanced in value or condition by refining or grinding, or by other process."

The process above mentioned whereby the roots and branches of the fustic are cut and shredded into pieces as small even as those contained in the importers' exhibit, must certainly constitute an advance in the value and condition of the wood. The wood of the roots and branches is to be used expressly for dyeing; so soon as it is severed from the ground it comes to this first estate as wood used expressly for dyeing. It has a certain value and is in a certain condition when it is thus severed from the ground. That condition is substantially changed and that value materially increased when the wood is afterwards ground or cut into small fragments, for in the new condition it may be transported at less expense and it is also in a form better adapted to its final use. The statutory provision of the act of 1897 relating to an advance in value or condition from refining, grinding, or other process is unqualified; any advance whatever in value or in condition, which results from refining or grinding, or other process, brings the wood within the dutiable class defined by paragraph 20 of that act.

It therefore seems clear that the importations entering under the act of 1897 were not free of duty as dyewood which was "not advanced in value or condition by refining or grinding, or by other process."

It may also be noted in this behalf that in G. A. 3489 (T. D. 17172) the Board of General Appraisers passed upon an importation of similarly shredded fustic which was entered under the tariff act of 1894. Paragraph 16½ of that act provided for the free entry of such dyewood if not advanced in value or condition by refining or grinding or by other process of manufacture. The board held that the wood as thus reduced to fragments by some kind of shredding process was not entitled to free entry under the foregoing provision. The language of paragraph 20 of the act of 1897 is not less comprehensive than the provisions of paragraph 16½ thus construed by the board in so far as the present controversy is concerned. Upon the substantial reenactment of the earlier provision into the later one the board of course gave the latter the same construction as the former.

However, as to those importations which were entered under the tariff act of 1909 a much more serious question presents itself. Under the applicable paragraphs of that act the corresponding provisions

relating to advancement in value or condition are not so comprehensive and unqualified as are those of the former acts. Quite to the contrary, an advancement of such dyewood in value or condition by any process or treatment does not alone deny the article free entry if such advancement is essential to the proper packing of the wood or the prevention of decay or deterioration pending manufacture. The provision relating to proper packing of course covers and includes packing for transportation. A new element is thus introduced into the paragraph which was not before the board in the case above cited, relating to like importations under the act of 1894. Under the prior acts such an importation was denied free entry if it had been advanced at all in value or condition by refining, grinding, or other process. Under the act of 1909, however, such an importation is given free entry, notwithstanding such an advance in value or condition by any process or treatment, provided only the advance so made be essential to its proper packing, or, as applied to this case, its proper packing for transportation.

The importers maintain that the fustic wood herein involved comes within this provision, that it was impracticable to ship the natural roots and branches in their shape and condition when taken from the tree, and that they were reduced in size to such an extent only as was essential to their proper packing for transportation.

The Government contends to the contrary—that the reduction in size of the wood was not essential to proper packing for transportation and that it was not done for that purpose only, but that the wood was reduced in size chiefly for the purpose of better fitting it for the boiling process for which it was designed and by means of which its dyeing properties were to be extracted. The Government contends that the reduction of the wood was therefore not essentially a part of its packing for transportation, but was rather the first step taken in the process of manufacturing dyeing material from it.

The question involved in the case therefore virtually becomes a question of fact, namely, whether the reduction of the wood to its condition at importation was essential to its proper packing or not.

From the testimony and the exhibits it appears quite clear that it is not practicable to ship the fustic wood in question in its natural shape and condition. If it were shipped in bulk in that condition, the freight rates would be unreasonable; if it were packed in its natural condition in sacks, its jagged projections would tear open the sacks and the contents would be scattered and lost. Therefore it is clear that the wood must be reduced in size to some extent in order to pack it for transportation.

It is also true that any such reduction in size does at the same time put the wood in better condition for its final use. As has been stated, the process of extracting the dyeing material from the wood is by placing it in open kettles and boiling it. The kettles used for this

purpose are not large enough to contain the natural roots and branches of the fustic, and besides the smaller the pieces into which the wood is reduced the more speedily and economically may the boiling process be completed. Therefore, the importers have necessarily a double interest in reducing the size of the wood, first, in order to prepare it for shipment and, second, in order to add to its value as a commodity by better preparing it for its final use in the boiling kettles. However, in case the applied process reduces the wood only so far as to fit it for shipment with reasonable commercial economy in view of all the conditions and circumstances of the case, such process alone does not deprive the wood of free entry, even though incidentally the value of the wood is also thereby increased as a commodity by becoming better adapted to its final use.

It is apparent that it may at times be difficult to find the proper dividing line in this process, so as to say with certainty that thus far the reduction is essential to proper packing and that any additional reduction is chargeable to the preparation of the wood for its final manufacture. And in this case that difficulty is plainly present, for this importation touches the border line between the two classes. However, there are several considerations which lead to a reversal of the decision entered by the board against the importers. In the first place, there is a substantial disagreement concerning the size of the pieces to which the fustic was actually reduced for importation. The pieces produced as samples by the Government are quite small, but the importers produce much larger pieces and establish by the testimony that these are more correctly representative of the importation. It is plain from an examination of the exhibits that the pieces are dry and brittle and are cut in such a way that they easily crumble from handling. They therefore constantly tend to become smaller as they are examined, and this somewhat prejudices the importers' case. If the pieces when imported were of the size claimed by the importers, they would not seem to be beyond such a reduction as was essential to proper packing. In the next place, the reasons given by the board for its decision are important; they are contained in the following extract:

The article in question is the root, trunk, and branches or limbs of the fustic tree, cut, broken, shredded, or otherwise reduced to chips, and is used in the process of coloring glove leather, imparting a yellowish color to the leather. As far as name, use, and description of the merchandise, the board, in G. A. 3489 (T. D. 17172), held fustic of like character and similar in condition to be a dyewood advanced, and upheld the assessment. Under the doctrine of *stare decisis* it is incumbent upon the board to follow this decision unless the evidence in the case at bar, or the issue presented, differs materially from that which was the basis of the board's decision in G. A. 3489, *supra*. An examination of the records in both cases, however, discloses the fact that the fustic here in issue is identical in all respects with that covered by G. A. 3489, *supra*.

We find the merchandise to be advanced in value or condition and hold it dutiable as assessed.

It appears from the foregoing extract that the board found this fustic to be identical in character with that held to be dutiable under the act of 1894; and the board therefore similarly classified it under the act of 1909, by force of the rule of *stare decisis*. But the several acts contain entirely different provisions in relation to such an article. As has already been noted the earlier act refused free entry to such wood if it was at all advanced in condition; but the latter act allowed free entry, notwithstanding an advancement in the condition of the wood, provided only such advancement was essential to its proper packing. The issues presented by the two several cases are therefore essentially different, and the rule of *stare decisis* alone is not controlling.

The opinion as above quoted correctly states that the issues presented in the several cases must be substantially alike in order that the rule of *stare decisis* should apply; but in the decision which follows that rule is applied notwithstanding the fact that the several issues are actually different.

For these reasons, taken together, the court *reverses* the decision of the board in so far as it relates to the merchandise imported under the act of 1909.

Modified.

DE VRIES, Judge, did not sit in this case.

UNITED STATES *v.* JOHN DUNCAN'S SONS ET AL. (No. 733).¹

TAMARINDS, PACKED IN MOLASSES.

It appears that "tamarinds" as a commercial designation has been accepted for a number of years in the administration of our tariff laws, and having been incorporated in the tariff act of 1909, it is to be inferred the interpretation so established was there adhered to. The addition of the words "packed in molasses" will not suffice to change the classification. The importation was entitled to free entry.

United States Court of Customs Appeals, December 6, 1911.

APPEAL from Board of United States General Appraisers, Abstract 26197 (T. D. 31788).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This importation consisted of tamarind fruit, to which molasses had been added, imported in barrels. It was returned for duty at 1 cent

¹ Reported in T. D. 32097 (21 Treas. Dec. 729).

per pound and 35 per cent ad valorem under paragraph 274 of the tariff act of 1909, the relevant part of which is as follows:

* * * Comfits, sweetmeats, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto, or preserved or packed in molasses, spirits, or their own juices. * * *

On appeal to the Board of General Appraisers the importation was admitted free under the provision of the free list, paragraph 688, as tamarinds. The Government appeals from this decision.

It is contended that this fruit is not tamarinds in its natural state, as it appears that the pod or shell has been removed. It appears, however, from the testimony of the importers' witnesses that the importation in question is the tamarinds known to commerce, and has been imported in the manner in which this was imported for many years, one of the importers' witnesses having had an experience of 30 years, and indeed none of the witnesses in the case instances the importation of tamarinds in any other condition, except small importations in its green state, which we hereinafter refer to. While the record is not very clear, the inference is strong that the sugar contents of this fruit are what give it its value for medicinal and other purposes, and this is preserved in the present importation. It is a product sold mainly to the drug trade.

A somewhat analogous question has arisen with reference to the free-list provision for shrimps and other shellfish, and it has been held that the removal of such shellfish from their shells, and even cooking and preparing them for use, does not take them out of the free list and place them under the other provisions of the tariff law. See *In re Wyman & Co.*, G. A. 6503 (T. D. 27791), and *In re protest of Doyen*, G. A. 6052 (T. D. 26387).

But we think the case need not be rested on analogy. As before stated, the proof discloses that importations of tamarinds in this form have been made for many years, and that they constitute the commodity known commercially as tamarinds.

The Government introduced witnesses to show the chemical analysis of green tamarinds, and in order to meet the testimony as to commercial designation, two inspectors were examined. The first inspector called by the importer testified that the goods in question here were tamarinds. But he also testified, on cross-examination, that he had seen tamarinds in other condition, namely, fresh in the pod, and that such tamarinds had been received at the port of New York. The question of how numerous were the importations was not gone into by this witness, but the Government later called another examiner of merchandise at the port of New York and introduced evidence showing that tamarinds in the green state had been imported. He testified that they were imported in baskets and that he had had four years' experience, during which time two importations of green

tamarinds had been passed on by him. When asked in what quantity green tamarinds had been imported, he replied, "Small quantities—a couple of baskets," and further testified that a small percentage of the importation of tamarinds came green. This testimony is not sufficient to overcome the testimony of the importers' witnesses that the tamarinds, such as was introduced in this importation, is the article of commerce, and this view is strengthened by the fact that tamarinds in molasses is not a new article of commerce.

Tamarinds were mentioned in the free list in 1872 and again in 1883, apparently omitted in 1890 and 1894, but reintroduced in the free list in 1897 and continued in 1909. As early as January, 1883, the Secretary of the Treasury had submitted to him the question of whether tamarinds, which prior to being packed in barrels had a quantity of crude molasses poured over them to keep them fresh during the voyage, were classifiable under the provision for fruit preserved in molasses. The Secretary, in his statement of the case (T. D. 5552), said:

The appraiser states, however, that the tamarinds underwent no process of preservation in the sense in which that word is usually understood when applied to preserved fruits, and that 95 per cent of the tamarinds imported prior to the time when they were placed on the free list were preserved in the same manner as those embraced in this appeal, and that they constituted then, as they do now, the tamarinds of commerce.

Tamarinds being exempted by law from duty, and the merchandise in question being tamarinds in the condition in which usually imported, they are free under the statute.

The word "tamarinds" having been, after this declaration of the Treasury Department, introduced in the act of 1883 and again in the act of 1897 and in 1909 the presumption is very strong that it is this article of tamarinds which Congress sought to exempt. It is the tamarinds of commerce.

Cases cited in which a reduction of fruits to pulp, such as date paste or cakes of nuts, had so changed the identity of the original articles as to place them under different classifications are not of much value in determining the question here presented, for we have here strong evidence that the tamarinds of commerce are tamarinds imported, as were those in the present case. The general rule that an *eo nomine* designation is controlling as against a mere general provision is recognized. But it is claimed on the authority of *Brennan v. United States* (136 Fed. Rep., 743), *United States v. Reiss* (136 Fed. Rep., 741), and *Rich v. United States* (61 Fed. Rep., 501) that this rule is not unyielding, but that the real purpose should be to gather the intent of Congress from the enactment. This is a correct statement of the law; but we think it does not militate against the position of the importers in the present case. In *De Forest v. Lawrence* (13 How., 274) the question involved was whether sheepskins were dutiable as raw hides and skins of all kinds, whether dry, salted,

or pickled. After reviewing the tariff acts upon the subject the court said:

The article (sheepskins with the wool on) has never been classed in any of the tariff acts under the designation of skins; but has been charged always, since it came under the notice of these acts, with a specific duty. It has been thus charged, since the act of 1828, down to the present act, a period of 18 years. And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practiced on at the customhouse.

If this language be applied to the present importation, there can be but one conclusion reached as to the intent of Congress in the employment of the word "tamarinds" since 1883. It has been the rule of interpretation announced by the Secretary of the Treasury and continued through three different tariff acts that tamarinds included an article other than fresh tamarinds, and when that word is employed in the free list it refers to the tamarinds of commerce. We can not conceive that it was the purpose of Congress to depart from this long-continued designation of tamarinds, nor do we think that it should be excluded from the free list by any uncertain enactment. Indeed this rule is conceded by Government's counsel, and it is admitted that the rule is settled that Congress, in reenacting successive tariff acts containing the same provision, must be understood to have so legislated in the light of departmental construction or construction given to such language by the courts, citing *United States v. Proctor* (145 Fed. Rep., 126).

But it is claimed that as the words "packed in molasses" have been added to the preserved-fruit paragraph of the present act, phraseology which had not appeared in any previous tariff law, the court is called upon to determine which is the proper classification, and it is said in this connection that there is evidence in the record that tamarinds, fresh in the pod, are now the subject of importation and of commercial transactions. As we have pointed out, the commercial transactions in fresh tamarinds are very limited indeed, and it is very doubtful whether the case would not fall in this aspect within the ruling of this court in *United States v. Rosenstein* (1 Ct. Cust. Appls., 304). But whether it does or not, the history of the meaning which has been given in the previous tariff acts and by departmental construction for many years leads to the conclusion

that the word "tamarinds" in the free list is used in a sense sufficiently comprehensive to cover the importation in question. While it is true that the provisions of paragraph 274 are broadened by the addition of the new words "preserved or packed in molasses," this fact does not operate to bring within its provisions an importation which in terms is made free in the free list. It would not be material under what provision of the tariff law the claim of free entry was asserted. If tamarinds such as those involved were not the tamarinds of commerce, they would have been dutiable under previous statutes under the catch-all clause. The long-continued usage of the Treasury Department went further than to exclude the importation from the comfit and sweetmeats section, but affirmatively established that they were entitled to entry under the free list.

The Board of General Appraisers reached the correct result, and the decision is *affirmed*.

DE VRIES, Judge, did not sit in this case.

DALE v. UNITED STATES (No. 626).¹

LEATHER-COVERED PIPE AND CIGARETTE-HOLDER CASES.

Common knowledge and observation serve to convince that the importation is one of smokers' articles, and these are dutiable not as manufactures of leather but as falling within "all smokers' articles whatsoever," paragraph 475, tariff act of 1909.—*Vandiver v. United States* (1 Ct. Cust. Appls., 194; T. D. 31219); *Mark Cross Co. v. United States* (*Ibid.*, 377; T. D. 31457); *Knauth v. United States* (*Ibid.*, 334; T. D. 31432).

United States Court of Customs Appeals, December 19, 1911.

APPEAL from Board of United States General Appraisers, Abstract 24862 (T. D. 31316) and Abstract 25186 (T. D. 31450).

[*Affirmed.*]

McLaughlin, Russell, Coe & Sprague (Edward P. Sharretts of counsel) for appellant. *Wm. K. Payne*, Deputy Assistant Attorney General (*Wm. A. Robertson*, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers wherein it held that the articles herein involved—to wit, leather-covered pipe cases and leather-covered cigarette-holder cases—were dutiable as "all smokers' articles whatsoever, not specially provided for," and not as "cases, made wholly of, or in chief value of leather, * * * not specially provided for." They were, therefore, held dutiable by the board under the provisions of paragraph 475 of the tariff act of 1909, rather than under the provisions of paragraph 452.

While this record is not free from error below, we are satisfied, after an examination of the entire record and the samples accompanying

¹ Reported in T. D. 32111 (21 Treas. Dec., 750).

the same, that no such error has been made as would deprive the appellant of a substantial right in final judgment. What constitutes "smokers' articles," and the relation of the two paragraphs the subject of consideration, have heretofore been the subject of decision by this court.

In *Vandiver v. United States* (1 Ct. Cust. Appls., 194; T. D. 31219) a similar question arose. That case concerned cedar boxes of suitable size, plain and decorated, marked "cigars" and "cigarettes," and similar boxes unmarked, but fitted and chiefly used for the purposes of and by smokers, which were held properly dutiable as "smokers' articles."

In *Mark Cross Co. v. United States* (1 Ct. Cust. Appls., 377; T. D. 31457) this court held that the provisions of paragraph 475 for "all smokers' articles whatsoever" was more specific than the provision for "cases of leather" in paragraph 452. We said:

The leather paragraph, however, provides for cases composed in chief value of leather—that is, for all such cases—and it therefore includes not only cigar and cigarette cases so composed, but also all other kinds of such leather cases. The smokers' paragraph provides for smokers' articles only, and would therefore include only such leather cases as are used by smokers—that is, the first paragraph provides for all cases composed in chief value of leather, the second provides only for such cases so composed as are used by smokers. Therefore, in so far as these two paragraphs respectively touch upon such leather cases, the first paragraph includes all, and the second only a part; the first is the genus and the second the species.

In *Knauth v. United States* (1 Ct. Cust. Appls., 334; T. D. 31432) the court, endeavoring to define under the language of earlier decisions and the statutes what constituted a smoker's article, said:

The phrase as used in the statute, "all smokers' articles whatsoever," is exceedingly comprehensive. The use of both words "all" and "whatsoever" seems to leave little doubt as to the intention of the legislature. * * *

The intensified form of the expression used, together with the far-reaching effect of the qualifying words stated, manifests to our mind a purpose on the part of the legislature to reach out into all branches of trade and commerce and to gather within the dutiable provisions of this paragraph everything used chiefly by smokers, in that pursuit and for that purpose, wherever else they may occur or within whatever other provisions of the tariff law the merchandise may be included.

In the light of these decisions, and that common knowledge and observation which is the experience of every one in every day life in cities and places where these goods are sold and used, convinces us beyond any peradventure of doubt that such articles as are the subject of decision here are reasonably included within the term "all smokers' articles whatsoever" as used in paragraph 475, and heretofore defined by this and other courts.

In this respect, the case is similar to *Robertson v. Salomon* (130 U. S., 412, 414), wherein the Supreme Court said:

Beyond the common knowledge which we have on this subject, very little evidence is necessary or can be produced. *Nix v. Hedden* (149 U. S., 304).

The decision of the Board of General Appraisers is *affirmed*.

CARSON, PIRIE, SCOTT & Co. v. UNITED STATES (No. 684).¹

TEDDY-BEAR MUFFS—TOYS.

The articles, "Teddy bears," have the shape of dolls with heads representing bears; the testimony shows they are sold to and handled by toy dealers almost exclusively; they are not reasonably fit for any use except to amuse children; they are toys and are dutiable as such under paragraph 431, tariff act of 1909.—*Illfelder v. United States* (1 Ct. Cust. Appls., 109; T. D. 31115).

United States Court of Customs Appeals, December 19, 1911.

APPEAL from Board of United States General Appraisers, G. A. 7214 (T. D. 31540).

[Reversed.]

McLaughlin, Russell, Coe & Sprague (Edward P. Sharretts of counsel) for appellants.
Wm. L. Wemple, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal involves the dutiable classification of so-called "Teddy-bear muffs." They were assessed for dutiable purposes by the collector at the rate of 44 cents per pound and 60 per cent ad valorem as wool wearing apparel under the provisions of paragraph 382 of the tariff act of 1909, which reads:

382. On clothing, ready-made, and articles of wearing apparel of every description, including shawls whether knitted or woven, and knitted articles of every description made up or manufactured wholly or in part, felts not woven, and not specially provided for in this section, composed wholly or in part of wool, the duty per pound shall be four times the duty imposed by this section on one pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem.

Appellants here, who were protestants below, maintained that they were toys within the language of paragraph 431 of the same act, which is as follows:

431. Dolls, and parts of dolls, doll heads, toy marbles of whatever materials composed, and all other toys, and parts of toys, not composed of china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this section, thirty-five per centum ad valorem.

The articles are in the shape and form of so-called "Teddy bears" and range in size from 12 inches high and 7 inches wide to 14 inches high and 8 inches wide. One of the official samples is white and the other is of a tan color. While they are characterized "Teddy bears" they are in fact and in the shape and form of dolls with heads representing bears.

This court in *Illfelder v. United States* (1 Ct. Cust. Appls., 109; T. D. 31115) laid down a rule of decision as to what constituted a toy in the following language:

In common speech, and as popularly understood, a toy is essentially a plaything, something which is intended and designed for the amusement of children only, and which by its very nature and character is reasonably fitted for no other purpose. Although an article may be chiefly used for the amusement of children, if its nature and character are such that it is also reasonably fitted for the amusement of adults,

¹ Reported in T. D. 32112 (21 Treas. Dec., 751).

or if it is reasonably capable of use for some practical purpose other than the amusement of children, it can not be classed as a toy unless it is affirmatively shown by the importer that it is so known and designated by the trade generally.

That definition in its pronouncement of essentials and their limitations, we think, is in complete accord with the theretofore adjudicated cases.

While the testimony in this record is scant and unsatisfactory there is sufficient, when taken in conjunction with the samples, to indicate the purpose and uses of the imported articles. If they are intended for a useful purpose that purpose is as a fur muff. In construction they are far short of such. They are made of an exceedingly poor quality of pile fabric which from the nature of its construction is not only a very poor representation of a fur or bear skin, and in strength and durable qualities would seem to permit of but little wear. That this was the intention of the manufacturers is further manifested by the fact that the articles are sewn together in what might be properly characterized little better than temporary construction.

In order to conserve the appearance of a doll or bear, the width is made so narrow that but little if any warmth could be afforded the hands of a child during cold weather. The muff aperture is made from side to side.

The uncontradicted testimony in the record is that these articles are sold to and handled by toy dealers almost if not exclusively; that when they are dealt in by department stores they are found in the toy department.

There is no testimony of trade use. The Board of General Appraisers was divided in its opinion and we are constrained to approve the opinion of the dissenting general appraiser, Chamberlain. It is conceded by all parties to the record that the articles are chiefly used for the amusement of children, but it is contended that they are also designed and used for the practical purposes of muffs. With the dissenting general appraiser we do not think they are reasonably fit for any other use than that of the amusement of children. Their size, construction, apparent durability, and every appearance, in our mind, conduces to this conclusion.

While they are incidentally useful, they are a plaything that can not with comfort be enjoyed except in seasons and in a manner that inevitably conduces in a slight measure to a useful purpose. This, however, we take as an incidental use growing out of the very nature of the article itself and necessitated by the character of the toy in order that it may be devoted to the amusement of children. The article is plainly so designed and constructed that while not in use as a muff it could be and probably is used as a doll. Its proportions, structure, and appearance are indeed more those of a doll than of a muff.

The decision of the board is *reversed*.

UNITED STATES *v.* SHING SHUN & Co. (No. 699).¹

PEELED MELON SEED USED AS FOOD.

Melon seed which have been reduced in size by peeling, that have been roasted and salted for food, their germinating quality disappearing in these processes, are not to be deemed vegetables proper or as unmanufactured, but come within the category of manufactured articles and are dutiable as a nonenumerated manufacture under paragraph 480, tariff act of 1909.—United States *v.* Kauffman (84 Fed. Rep., 446).

United States Court of Customs Appeals, December 19, 1911.

APPEAL from Board of United States General Appraisers, Abstract 25572 (T. D. 31589).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Wm. K. Payne*, Deputy Assistant Attorney General, on the brief), for the United States.

Joseph G. Kammerlohr and *John Giblon Duffy* for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This importation was peeled melon seeds. We are here called upon to decide whether such merchandise may be properly classified as a "vegetable, cut, sliced, or otherwise reduced in size," or "a vegetable, parched or roasted, or prepared in any way"; or, whether it is an unenumerated manufactured or unmanufactured article. The Board of General Appraisers held it dutiable as a nonenumerated unmanufactured article, and this is an appeal from that decision.

The facts in the case are exceedingly meager. There is no brief for the respondent, appellee. The testimony in the record, when read in conjunction with the return of the appraising officer at the port of San Francisco, whereat the merchandise was imported, shows that the merchandise consisted of watermelon seeds, the hulls of which have been peeled off, and the seeds have, therefore, been reduced in size.

The protestant alleges in his protest, however, that the merchandise consists of "watermelon seed meats salted and roasted, which are eaten by the Chinese as a relish and are not suitable for planting, as they will not germinate." While this is not testimony in the case, it may be taken in the nature of an admission against interest, where it is such, and be so considered by the court.

The fact that they are prepared for and eaten as a relish would seem to put them beyond the category of vegetables as that term is used in customs acts. They are cut, shelled, and dried, and are also parched or roasted; but they are not "vegetables" so treated, but "seeds" so cut, roasted, etc., an entirely distinct tariff entity. Paragraphs 252 and 266, act of 1909. They are at most the seed of a vegetable so far as derivation is concerned. *Robertson v. Salomon* (130 U. S., 412); *Nix v. Hedden* (149 U. S., 304).

¹ Reported in T. D. 32113 (21 Treas. Dec., 753).

We are impressed with the reasoning of the United States Circuit Court of Appeals for the Second Circuit in the case of *United States v. Kauffman* (84 Fed. Rep., 446), and that the words of the court there adopted are applicable here and in principle decisive of this case. The subject under consideration was hulled millet seeds. The question was whether they were dutiable as "seeds" or a manufactured article. The court said:

The merchandise is millet pulp from which the hull has been removed, and therefore it will not germinate and can not be used for agricultural purposes. It has been destroyed as a "seed," according to the common understanding of the word or according to the meaning given to it by lexicographers, and has been removed by the removal of the hull to a different condition and to be used for different purposes. It is used largely, especially by persons of German birth, for food, as oatmeal is used, and it is also used for food for birds. Millet seed not hulled is not used for human food.

Based upon the facts as they appear and must be taken in this record, we think a melon seed which has been peeled, and thereby reduced in size, and roasted, whereby its germinating power has been destroyed, if it had not already been destroyed by the peeling, and salted, whereby it is prepared for immediate use as a food and so eaten, is clearly within the category of manufactured articles, and that this merchandise is, therefore, properly dutiable as a nonenumerated manufactured article.

The decision of the Board of General Appraisers is *reversed*.

PITTSBURGH PLATE GLASS CO. v. UNITED STATES (No. 587).¹

1. CUSTOMS USAGE.

It is only in a case where there is a doubt as to the meaning of the statute itself that the usage of the customs may be held to determine the construction of that statute.

2. SIMILITUDE CLAUSE.

That the article here contains no wool must be assumed, but it appears certainly to be felt, and since its use is substantially the same with woolen felt, there being shown a similar though not identical use, it is dutiable under the similitude clause, tariff act of 1909.—*United States v. Roessler* (137 Fed. Rep., 770).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7157 (T. D. 31253).

[Affirmed.]

Sidney G. McKay and *Clarence M. Brown* for appellant.

D. Frank Lloyd, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise consists of a mat of unwoven hair, alleged to be composed in part of wool. It was returned for duty as "unwoven

¹ Reported in T. D. 32162 (22 Treas. Dec., 48).

felt in part of wool," at 44 cents per pound and 60 per cent ad valorem under the provisions of paragraph 382 of the tariff act of 1909, which, in so far as pertinent, reads:

382. * * * Felts not woven, and not specially provided for in this section, composed wholly or in part of wool, the duty per pound shall be four times the duty imposed by this section on one pound of unwashed wool of the first class, and in addition thereto sixty per centum ad valorem.

The importer claims the merchandise properly dutiable at the rate of 20 per cent ad valorem as a nonenumerated manufactured article under the provisions of paragraph 480 of said act, which reads:

480. That there shall be levied, collected, and paid on the importation of all * * * articles manufactured, in whole or in part, not provided for in this section, a duty of twenty per centum ad valorem.

At the different hearings much testimony was introduced and a deposition taken abroad of the manufacturer of the particular merchandise was introduced, all for the purpose of establishing on behalf of the importer, first, that the merchandise was not a felt, and, secondly, that it was not in part of wool. The Government's testimony was directed to the point that the merchandise was in part of wool. The Board of General Appraisers held that the merchandise was a felt made by a secret process, the question of how and by what process it was made being held not material, and that it did not contain wool in any appreciable quantities. The board further held that the merchandise was properly dutiable by similitude per force of paragraph 481 of the tariff act of 1909 to a "felt wholly or in part of wool." The similitude section reads:

481. That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned. * * *

In the briefs and at the hearing before this court the importer strenuously contended that the undisputed record conduces to the claim that the imported article is not a felt, and that it is in no part of wool. That it is in no substantial part of wool is found by the board, and we think amply sustained by the testimony. That it is or is not a "felt" is a question of more complexity, which was found against the importer by the board upon the facts introduced in the case. Were it an open question with us we might not readily accept the finding of the board upon the testimony adduced. The merchandise, however, was found and returned by the collector to be "unwoven felts." The importer in its protest alleges that the merchandise is "one bale of polishing felt, ordinary quality." Almost every witness in the case, called by either importer or the Government, referred to the imported merchandise as a "felt" or "polishing

felt." This is notably true of Mr. S. G. de Kay, counsel for the importer, who took the stand as a witness in its behalf, and who constantly characterized this merchandise as a "felt." The Board of General Appraisers found the same to be a "felt." We therefore feel constrained by this record to assume, for the purpose of decision in this case, that the imported merchandise must be considered a felt.

The importer's allegations in its protest, which are in perfect accord with the return of the collector, constituting the pleadings in the case, would seem to conclude this question.

The importer in his proofs is confined to the allegations of his protests. *Arthur v. Morgan* (112 U. S., 495), *Herrman v. Robertson* (152 U. S., 521), *Presson v. Russell* (152 U. S., 577), *Heinze v. Arthur's Executors* (144 U. S., 28), *Battle v. United States* (108 Fed. Rep., 216).

Upon the facts of the case, therefore, we are concluded by the record, and it must be assumed for the purposes of decision, first, that the imported article is a felt; secondly, that it contains no wool.

It is contended for the Government that the similitude clause controls, in that the use of the imported article is similar to that of felts made wholly or in part of wool, dutiable under paragraph 382 and used solely in connection with plate-glass polishing machines for the purpose of polishing the plate glass.

This contention is controverted by counsel for the importer, who insists that the fact that the merchandise is used to produce identical results does not constitute similitude of use within the provisions of paragraph 481, quoted *supra*; and, secondly, that the long-established customs usage, dating from 1903 until the origin of this controversy in 1910, whereby this merchandise was, during said period, assessed as herein claimed by the importer, should control. We do not think this is a case where the principle of long-established customs usage is determinative. The application of that principle of judicial interpretation confines its exercise to cases wherein there is a doubtful meaning of a statute. In such cases of doubt long-established customs usage may be invoked as determinative of one contention or the other. There is no dubious statute here. The two statutes involved are the one levying duty upon felt articles wholly or in part of wool, paragraph 382, and the similitude clause, paragraph 481, making likewise dutiable any article more similar in quality, texture, material, or use to one dutiable under said paragraph 382 than to any other article covered by the tariff law.

In terms, and as adjudicated, there is no question of doubt attending the language of either of these paragraphs of the law. If there is doubt, it is to the facts constituting or differentiating similitude between the different articles of merchandise. The rule of construction, therefore, has no application.

The sole remaining question is whether or not there is a similitude of *use* between the imported article and felts made wholly or in part of wool. The uncontradicted testimony is that for many years last past there has been, and now is, imported into and manufactured in the United States and known to its commerce an article which concededly is a felt made wholly or in part of wool used solely in connection with plate glass manufacturing operations for the purpose of polishing the plate glass. Invention seems to have improved upon this process and devised what is known as the Belgium plate-glass machines. As a part of these machines as a polishing agency it has been made practical to use a less expensive polishing apparatus, to wit, the imported felts, mats, or whatever the imported articles may be styled. It appears from the uncontradicted testimony in the record that the method of using each of the articles is somewhat different, incident to the difference in the machinery employed, but they are used substantially in the same manner. In the one case motion of a certain direction is had, while in the other motion of a different direction is given. The result in each case is identical, so that it seems to us that the conclusion is inevitable that there is a similitude, though not an identity in the mode of use.

It is pertinent to quote upon the subject of the application of the similitude clause *United States v. Roessler* (137 Fed. Rep., 770).

The counsel for the appellant have taken pains to point out numerous instances wherein the two articles differ, but it must be borne in mind that the statute does not require identity; if that were necessary the statute would have no *raison d'être*. It is enough if there be a substantial similitude in any one of the particulars mentioned—material, quality, texture, or use. *Arthur v. Fox* (108 U. S., 125).

In *Pickhardt v. Merritt* (132 U. S., 252) the Supreme Court of the United States said, in approval of construction by the lower court, as follows:

* * * The mere application to the dyeing of fabrics would not create the similitude, but that if there was a similitude in the mode of use, a similitude in the same kind of dyeing, producing the same colors in *substantially the same way*, so as to take the place of aniline dyes in use, there would be a similitude in use.

So in *Murphy v. Arnson* (96 U. S., 131), in speaking of the application of the similitude clause, the Supreme Court of the United States laid down the doctrine that the similitude "*plainly refers to its employment, or its effect in producing results.*"

So, also, in *Patterson v. United States* (166 Fed. Rep., 733), *Arthur v. Fox* (108 U. S., 125), *Rosenstern v. United States* (171 Fed. Rep., 71).

Counsel for the importer has with much force and reason brought to the attention of the board and this court by the record the fact that this conclusion levies a rate of duty of over 400 per cent upon the imported article, which has not been successfully manufactured in the United States. While this is a regrettable result, and one

which calls upon this court, under the decisions of the Supreme Court of the United States (see *Kirby v. United States*, 7 Wall., 486), for an exercise of every legal intendment in avoidance of such a result, this court is nevertheless constrained, by the well-established rules of construction adopted by the Supreme Court of the United States and this court in customs cases, to reach the conclusion herein announced. It may be extremely regrettable that the court by the often and well-considered rules of decision is compelled to a conclusion which in this particular instance seems to work a hardship. Nevertheless, it is better to visit that unhappy result in a particular case than it is for a court to assume, in any case whatsoever, to set at naught the well-settled rules of construction and mandates of the statute in order to reach a result however more desirable. The matter then becomes a subject for legislation. Legislation can be neither certain nor effective, nor can the rights and properties of the citizen ever become fixed and certain, except in the presence of strict adherence to the rules of judicial interpretation by the courts.

Affirmed.

UNITED STATES *v.* OVINGTON BROS. & Co. (No. 597).¹

EMERGENCY OUTFIT OF TOOLS FOR AN AUTOMOBILE.

Leather cases fitted with an assortment of tools, consisting of a screw driver, saw, file, and small blades, for which a single handle suffices when used, are not dutiable under section 452, tariff act of 1909, as a "traveling set," but, adapted and intended for emergencies only, they are dutiable as articles made wholly or in part of metal, under paragraph 199 of that act.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 24618 (T. D. 31236).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Chas. Duane Baker* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers reversing the action of the collector at the port of New York assessing duty upon what the appraiser thereat returned as "cases fitted with assortments of tools arranged for the use of automobilists and travelers."

The cases in question were composed wholly of leather, and described by the official examiner as—

Traveling tool goods, consisting of a case made wholly of russet leather, sometimes made of two and sometimes of four parts, from 4 to 5 inches long and 3 to 4 inches wide and about 1 inch thick, and made of convenient size to slip into the pocket.

¹ Reported in T. D. 32163 (22 Treas. Dec., 52).

The cases were fitted with an assortment of tools consisting of a screw driver, saw, file, and other small blades, for which one handle was provided of such size and construction that the different tools could be fitted into the handle like the blades of a pocketknife. The handles, with the accompanying tools, were fitted into the leather cases, and both the handles and attached tools, or implements attached, were imported together as a single article. It is conceded that they were intended for the use of automobilists.

The collector at the port of New York assessed duty upon these articles at the rate of 50 per cent ad valorem under paragraph 452, hereinafter quoted. The Board of General Appraisers reversed the decision of the collector, and held the merchandise dutiable as "articles wholly or in part of metal" under the provisions of paragraph 199 of the tariff act of 1909.

It is contended by the Government that paragraph 452 of the tariff act of 1909 is the applicable one. The paragraph reads:

452. Bags, baskets, belts, satchels, card cases, pocketbooks, jewel boxes, portfolios, and other boxes and cases, made wholly of or in chief value of leather, not jewelry, and manufactures of leather, or of which leather is the component material of chief value, not specially provided for in this section, forty per centum ad valorem; any of the foregoing permanently fitted and furnished with traveling bottle, drinking, dining or luncheon and similar sets, fifty per centum ad valorem.

The examiner of merchandise at that port testified that in his judgment metal was the component material of chief value in the article as imported.

The crucial point in this case, upon which decision must turn, is whether or not the imported article may properly be said to be "a case permanently fitted and furnished with a *traveling* bottle, drinking, dining or luncheon or similar set," within purview of the last provision of paragraph 452.

It is contended by counsel for the importer that this wallet form of leather is not a "case" *ejusdem generis* with the enumerated cases, boxes, baskets, etc., in the first portion of said paragraph. We think that this is a closer question than the former, and in our view of the former unnecessary of decision.

A set of automobilist's tools, which are to be used in the every-day use of that machine, does not commend itself to the court as within the limiting language of the last portion of the paragraph. It seems to us that that language is intended to cover only that class of articles the more common use of which is confined to extended journeys of travel, rather than to every-day use. The enumerated classes within the provision are of that kind only. This article is intended for occasional and exceptional use. It is an emergency outfit, used and intended to be used whenever there is necessity therefor outside or possibly inside of the garage or away from similar tools. We think this article more an emergency than a traveling set.

It does not strike us as within the common acceptation of the term "travel" that the word is expressive or descriptive of the everyday business or even pleasure journeys of the automobilist in or about the business errands or the social intercourse of the day.

We think the decision of the board was correct, and find no reason for disturbing its findings.

Affirmed.

UNITED STATES v. STRAUS & Co. (No. 631).¹

ARTIFICIAL SILK YARNS, SINGLES, NOT TRAMS.

The merchandise is the crudest form of artificial silk known to the throwster's trade; it corresponds precisely to the natural silk single as this is made up from the cocoon; it was properly held to be in the form of singles and not tram, and the form being the determining fact for consideration, it was dutiable as singles under paragraph 405, tariff act of 1909.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7190 (T. D. 31404).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise is so-called artificial silk yarn, imported in skeins. It is agreed in the case that the merchandise is produced from a form of cellulose obtained by chemical processes from cotton or wood. In a soft liquid condition this cellulose is forced through small orifices into a hardening bath, thereby forming small threads or filaments. These threads or filaments are then gathered together and twisted into the form as imported. It consists of a soft, lustrous yarn, which resembles silk, and is, therefore, called "artificial silk yarn."

The processes and the imported merchandise are comparatively new to commerce. Its commercial importance dates subsequent to the enactment of the tariff act of 1897. The question arises under the tariff act of 1909, paragraph 405. That paragraph, so far as applicable, reads:

405. Yarns, threads, filaments of artificial or imitation silk, or of artificial or imitation horsehair, by whatever name known, and by whatever process made, if in the form of singles, forty-five cents per pound; if in the form of tram, fifty cents per pound; if in the form of orgazine, sixty cents per pound. * * *

The collector assessed the merchandise thereunder at the rate of 50 cents per pound as being "in the form of tram." The importer, who is appellee here, makes contention that it is properly classifiable as "in the form of singles." The board sustained the contention of the importer. The Government appeals. The sole question, there-

¹ Reported in T. D. 32164 (22 Treas. Dec., 54).

fore, before the court is whether the imported merchandise, described aforesaid, is more nearly in the form of silk "singles" or silk "tram."

A voluminous record was made at the hearing, testimony having been introduced by both the Government and the importer.

A casual consideration of the paragraph itself discloses an assumption upon the part of the legislative body that at the time of the enactment of the provision there existed in trade and commerce artificial silk in the form of "filaments," "threads," and "yarns," and that in addition thereto there existed in that trade an article known as "imitation horsehair," known by various designations and made by different processes.

The controversy as waged between the Government and importer, and in consequence the testimony and argument below and here, is chiefly confined to the consideration of whether or not silk singles, as made by the several filaments being drawn from the cocoons, are by that process subjected to a twist. Indeed, while it is admitted upon all sides that there is a slight twist in the making of all silk singles, it is contended by the Government that the twist in the making of artificial silk is much greater than in the natural silk, and that this excessive degree of twisting carries the artificial silk into a category beyond singles and into that known as tram. In other words, it is made a question of the degree of twisting to which the assembled filaments were subjected. The witnesses are not in accord.

It is agreed that in the making of natural silk singles more twist is necessary in some cases than in others. The twisting takes the place of the natural gum. Therefore, according as there is much or less gum, and as there is a greater or lesser adhesive force necessary, twisting is indulged. There being no natural gum attendant upon the manufacture of artificial silk, twisting alone is relied upon to effect adhesion of the filaments. The court agrees with the board in its finding.

In view of the conceded fact that some natural silk singles are twisted much and others only slightly, thereby, if the twist is the criterion, fixing an unstable and varying basis of comparison, we can not assume that Congress intended such a basis of comparison. Indeed, the language of the paragraph which makes "the form" the criterion would not seem to confine the comparison to the degree of twisting. Each is composed of an aggregation of filaments laid longitudinally. In the one case adhesion is accomplished solely by the twisting, and in the other by gum assisted by at least a slight twisting. In that each is composed of a number of filaments adhering into a single thread *without doubling* they are alike.

Lexicographic authority accords with this view. Typical of these is the Standard Dictionary. Its definitions are as follows:

Single.—1. That which is single. * * * 2. pl. Reeled filaments of raw silk twisted to give them firmness, but not *doubled*.

Tram.—Silk filling or wool, having 12 to 32 filaments, and 3 to 5 turns per inch. It is made up of two or more "singles" *twisted* together in a direction *opposite* to individual twist.

Century Dictionary and Cyclopedia:

Single.—11. That which is single in any sense of the word. Specifically (a) pl. The *twisted* threads of silk made of single strands of the raw silk as wound from the cocoon. When simply cleaned and wound, the silk is called *dumb singles*, and is used for making bandana handkerchiefs, and, after bleaching, for gauze and similar fabrics. When wound, cleaned, and thrown, the silk is termed *thrown singles*, and is used for ribbons and common silks. When wound, cleaned, *doubled*, and thrown, and twisted in one direction, it becomes *tram*. * * * When wound, cleaned, spun, doubled, and thrown, so that it resembles the strand of rope, it is called *organzine*, and is used for warp.

Tram.—A kind of *double* silk thread, in which two or more strands or singles are twisted together in a direction contrary to the *twist of the singles*. * * *

The term is one peculiar to the silk throwsters trade, and it is admitted by all parties to the record that the simplest form of raw material known to the throwsters trade is the silk single, and that this merchandise, as imported, is the crudest form of artificial silk in that trade. It corresponds precisely therein to the well-known natural silk single as made up from the several cocoons.

The difference in degree in the twist between the natural and artificial silk is no greater than that between well-known individual kinds of natural silk singles. Structurally, then, each being constituted by assembling the elementary filaments of its component material into a substantially similar condition, they may be said to be in substantially the same "form." This assembled condition being the one *as imported* without doubt is, by every element of comparison, more nearly in the form of silk singles than tram.

We have examined with care the voluminous record presented in this case and the findings of the Board of General Appraisers based thereupon and are unable to discover any error therein.

The decision of the board is *affirmed*.

THOMAS & Co. v. UNITED STATES (No. 635).¹

PAPER SUITABLE FOR PAPER HANGINGS.

The evidence does not show that the paper of the importation is either commercially or commonly known as printing paper, distinguishable as such from wall paper; it was not brought in to be used in printing books, and the testimony is conflicting as to whether it is suitable for such a purpose. The case is ruled by *Pritchard v. United States* (T. D. 31974), and the merchandise was properly held not to be printing paper.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 24804 (T. D. 31300).

[Affirmed.]

Brooks & Brooks (*Frederick W. Brooks, jr.*, of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise imported consisted of white paper in reels or rolls 19½ to 22 inches wide, imported for use as material for paper

¹ Reported in T. D. 32165 (22 Treas. Dec., 57).

hanging. Duty was assessed thereon under paragraph 415 of the tariff act of 1909 for paper hangings. The importers' protest claimed the paper to be dutiable as printing paper suitable for printing books.

It is conceded by the Government that the paper when imported was not a completed paper hanging, but merely material for making a paper hanging, and it is now claimed that the paper is dutiable as paper not specifically provided for. The burden is of course upon the contestant to show that the paper is brought within the paragraph named in the protest. This paragraph, so far as material, reads as follows:

Printing paper unsized, sized, or glued, suitable for the printing of books and newspapers, but not for covers or bindings, not specially provided for in this section,
* * * valued above five cents per pound, fifteen per centum ad valorem.

The evidence as to whether this paper was suitable for printing books was conflicting. There was evidence given by printers that they had not seen paper of these dimensions used for that purpose, but on the other hand there was testimony of other witnesses showing that it could be so used. This apparent conflict is accounted for by the appellants' counsel by the statement that the witnesses who testified for the Government were mainly witnesses who used flat presses and printed only from a sheet, whereas it is said that modern printers print from the roller.

The board was of the opinion that the importer had failed to make a case. It was found as a fact, and the evidence supports this statement, that the merchandise in question was not imported for the purpose of printing books or newspapers. It is not claimed by counsel for the Government that this is a conclusive fact to disprove that the paper is printing paper. But it is said, and said truly, that in the absence of any other proof as to whether this is or is not printing paper, it is a fact entitled to some consideration.

There was testimony given by a witness for the importer that this paper is suitable for making wall paper. The fact that it comes in rolls instead of sheets would appear to make it peculiarly adapted for such a purpose. It is also true that wall paper must have a good printing surface. It is said in the brief of counsel that the use of this paper is a rare and exceptional use, but we find in the evidence no basis for this statement.

A careful examination of the testimony fails to disclose that this paper is either commercially or commonly known as printing paper as distinguished from wall paper. This failure of proof is fatal to the appellant's contention under our decision in *Pritchard v. United States* (2 Ct. Cust. Appls., 247; T. D. 31974). In dealing with a provision of the act of 1897 we held, affirming the decision of the Board of General Appraisers, that Congress intended by the term "printing" as used in the paragraph, that the paragraph should apply

only to such paper as was recognized as printing paper. It was said by the court, speaking through Barber, Judge:

The words themselves signify some particular kind of paper and in addition it must be suitable for books.

The question of whether it is printing paper or not may well be determined by the understanding of the trade in relation to paper, but whether or not it is suitable for books still remains a question of fact probably not dependent upon any trade understanding.

That case must be held to rule the present, and it follows that the decision of the Board of General Appraisers should be *affirmed*.

HEIDE v. UNITED STATES (No. 645).¹

ALMONDS, SHELLED, INTERMIXED WITH DIRT.

There is no question of commercial designation raised, and no allowance is claimed because of the presence of dirt or refuse. A review of the history of tariff provisions relative to almonds makes it plain there was no intention on the part of the Congress to depart from an established usage of years by which almonds shelled bore a higher rate of duty than almonds unshelled, and by which almonds *eo nomine* were made to take a duty higher than the duty imposed on nuts generally "of all kinds," not specially provided for. The importations were properly held dutiable under paragraphs 269, tariff act of 1897, and 280, tariff act of 1909, respectively, as clear almonds, shelled.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7199 (T. D. 31475).

[*Affirmed*.]

Kammerlohr & Duffy, John G. Milburn, and John G. Milburn, jr., for appellant.

Wm. L. Wemple, Assistant Attorney General (Frank L. Lawrence on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

This case involves almonds imported under the tariff acts of 1897 and of 1909. One hundred and twenty-one protests relate to importations made under the earlier and 21 to those made under the later act. The question is whether these almonds are dutiable as assessed under the provisions of paragraph 269 of the act of 1897 and paragraph 280 of the act of 1909, which are as follows:

269. Almonds, not shelled, four cents per pound; clear almonds, shelled, six cents per pound.

280. Almonds, not shelled, four cents per pound; clear almonds, shelled, six cents per pound; apricot and peach kernels, four cents per pound.

or under paragraph 272 of the act of 1897 and paragraph 283 of the act of 1909, which are as follows:

272. Nuts of all kinds, shelled or unshelled, not specially provided for in this Act, one cent per pound.

283. Nuts of all kinds, shelled or unshelled, not specially provided for in this section, one cent per pound; but no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

¹ Reported in T. D. 32166 (22 Treas. Dec., 58).

The Board of General Appraisers overruled the protests.

These almonds are of the kinds known as Bari, Sicily, and Majorca almonds, and are imported in bulk in burlap bags containing from 110 pounds to 220 pounds each. They have been removed from the shells and as imported are intermixed with dirt, dust, and pieces of shell. Some of the almonds are broken and some imperfect.

The contention of the importer here is that these almonds are not "clear almonds, shelled" within the meaning of the quoted paragraphs of the respective acts and that therefore they are dutiable under the provisions relating to "nuts of all kinds" in the paragraphs above quoted.

No question of commercial designation is raised and the importer does not claim any allowance in duties on the merchandise by reason of the presence therein of dirt, dust, and pieces of shell. The evidence by which this admixture of dirt, dust, and pieces of shell is shown to be present in the importations was introduced solely for the purpose of establishing that these almonds are not "clear almonds, shelled" as the importer interprets that expression in the statute.

The importer's claim is that the words "clear almonds, shelled" means the selected almond meats ready for consumption, unbroken in form, substantially perfect in shape, covered with the brown outer skin which is characteristic of almonds, and from which all dirt, dust, and pieces of shell have been removed. He introduced in evidence samples of such a product, commonly called "Jordan" almonds, which apparently possess all the qualities required to satisfy his claim and which are an article of commerce. He also shows that the importations here, after being subjected to three or four manipulations, will yield substantially a like product, and it appears that the somewhat general practice is to so treat almonds like these before they are sold to the retail trade.

The Government, on the other hand, contends that the term "clear almonds, shelled," means the almond kernels from which the shells have been substantially removed and which are in an approximately clean condition, needing only such further attention in order to fit them for final use as any conscientious manufacturer would feel bound to give in order to make them completely ready for human consumption, and urges the importations here are such.

The fact will not be lost sight of that in the disposition of this case it is not material what is the exact amount or percentage of the impurities mentioned that is found to exist in these importations, because it is apparent that a substantial amount exists, enough to take the same out of the importer's interpretation of the expression "clear almonds, shelled," and also because, as hereinbefore stated, the importer has expressly waived any claim for allowance by reason of the presence thereof.

Since 1804 almonds in some form or other have usually, but not always, been subjected to a duty. By the act of the year last men-

tioned it was provided that almonds, without regard to their condition, should pay a duty of 2 cents per pound; in 1816 it was increased to 3 cents per pound; in 1846 almonds were declared dutiable at 40 per cent ad valorem and nuts not otherwise specially provided for at 30 per cent ad valorem; in 1861 the duty on shelled almonds was placed at 4 cents, on almonds at 2 cents, and on other nuts not specially provided for at 1 cent per pound, while later in the same year the duty on shelled almonds was raised to 6 cents, on almonds to 4 cents, and upon nuts not otherwise specially provided for to 2 cents per pound; in 1864 almonds were required to pay 6 cents and shelled almonds 10 cents per pound duty, and nuts not otherwise provided for were either free or dutiable at some low rate; and in 1883 the statute relating to the subject was revised and enacted as follows:

Nuts:

Almonds, five cents per pound; shelled, seven and one-half cents per pound; filberts and walnuts, of all kinds, three cents per pound.

Peanuts or ground beans, one cent per pound; shelled, one and one-half cents per pound.

Nuts of all kinds, shelled or unshelled, not specially enumerated or provided for in this act, two cents per pound.

The act of 1890 fixed the duty upon almonds not shelled at 5 cents per pound, clear almonds, shelled, $7\frac{1}{2}$ cents per pound; the acts of 1894, 1897, and 1909 each respectively provided a higher rate of duty upon clear almonds, shelled, than upon almonds not shelled, and fixed a lower duty than either of those imposed upon almonds upon nuts of all kinds, shelled or unshelled, not specially provided for, and the act of 1909 also provided that no allowance should be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

A cursory review of these statutes at once suggests that Congress in dealing with the subject of almonds has consistently endeavored to provide for duty thereon *eo nomine* in any shape in which the same might become the subject of importation, and did not intend that almonds in any form should be imported at the lesser rate of duty which has always obtained upon nuts not specially provided for.

It is agreed that the word "clear," as descriptive of almonds, was first used in the tariff act of 1890, since which time it has been retained.

The evidence shows that for over 30 years almonds from which the shells have been removed, whether they were like the importations here or of a higher or lower grade, have been classified for duty, if imported prior to 1890, as shelled almonds, and if imported subsequent thereto, as clear almonds, shelled, at the port of New York, and from the history of this and other cases it is apparent that such importations were of no inconsiderable amounts. During all this time it is not shown that protests against this classification have ever been made until within the last three or four years, to which reference will later be made.

The construction of some phases of the almond statute has been before the board and the courts, as well as the Treasury Department, but the precise question here involved has not been considered by either of them, so far as we are advised, until the case of *Heide v. United States* (175 Fed. Rep., 316), which was heard in the Circuit Court for the Southern District of New York and which was the result of the protests made in the last three or four years above referred to. In that case, the contention made by the importer here was sustained by the Circuit Court and the evidence before us tends to show that the merchandise there involved was of the same class as the importations here. This decision, it may be noted, was not rendered until after the enactment of the tariff law of 1909, hence no presumption that the same has received legislative recognition may be indulged in here. Aside from that case and contemporaneous or subsequent protests and litigation resulting therefrom, there is nothing to show nor is it claimed that during the whole history of tariff legislation almonds like the importations here have been claimed to be entitled to admission or have been admitted to duty under the provision relating to nuts not otherwise provided for.

It will be observed that the *Heide* case above referred to was an appeal from a decision of the Board of General Appraisers (T. D. 28816), in which the board had sustained the contention the Government makes here, and had also held, amongst other things, that no allowance should be made for shells, dust, dirt, and other impurities in shelled almonds that were not shown to be unusual or abnormal in quantity, as the goods were bought and sold in the commerce of this country, and further that this decision was the only adjudication as to the meaning of this statute which had been made prior to the enactment of the tariff law of 1909.

It may with some force be urged and it is urged by the Government that the action of Congress in reenacting the almond statute was a recognition that this construction of the almond paragraph by the Board of General Appraisers was correct, and further that by the amendment to the provision relating to nuts of all kinds, shelled or unshelled, in the law of 1897, found in paragraph 283 of the act of 1909, providing that no allowance should be made for dirt or other impurities in nuts of any kind, shelled or unshelled, Congress designed to settle the question that not only as to nuts, but as to almonds, there were but two classes, namely, one shelled and the other not shelled, thereby emphasizing its previous intention in that regard, as already pointed out.

In Notes on Tariff Revision the attention of Congress was specially called to the almond and nut paragraphs. Reference was therein made to the decision of the Board of General Appraisers last above referred to and the amendment which Congress made to paragraph as above set forth, was therein suggested to it in the precise lan-

guage adopted as designed to prevent further litigation over the claims made by the importer in T. D. 28816. Nor was Congress left unaware of the importance of the subject, because it was in the same connection therein advised that the importations, apparently annually, of clear almonds, shelled, was valued at \$1,773,709 and of almonds not shelled at \$441,141.

It seems unbelievable that, with this information before it, Congress intended to depart from the practice that had then so long obtained in regard to the classification of almonds and from its own consistent policy, ever since almonds shelled and not shelled had been dutiable, to impose a higher rate of duty upon the former article.

It is proper, in interpreting an ambiguous statute, to determine whether the result of a claimed construction thereof is or is not inconsistent with the established policy of the law, if one can be ascertained, upon that subject. That policy, as already pointed out with reference to almonds, has generally been to treat them independently from nuts shelled or unshelled and has always been to impose a duty upon shelled almonds at least 50 per cent higher than that upon almonds not shelled. If "clear almonds, shelled" be held inapplicable to the importations here and they be found dutiable as shelled nuts, it is apparent that the shelled almonds will pay a much less duty than if they had been imported before being shelled. In other words, the product to which labor has been applied and which has been improved in its condition pays a less duty than the same article in its crude state. Not only this, but the evident purpose of Congress to treat almonds, not shelled or shelled, separately from nuts for duty purposes is defeated.

Such results, it must be confessed, are illogical and inconsistent and should not obtain unless required by the unambiguous language of the statute. Nor is this all; the construction insisted upon by the importer would seem to contravene the general theory of our tariff laws, which is to protect American industries, to equalize duties, and to provide revenue. American industries are not consistently protected by permitting entry of shelled almonds at a lesser rate than almonds not shelled. Such a course would not seem to result in an equalization of duties on almonds, and the Government would seem to be deprived of the revenue that for many years it has evidently intended shelled almonds should pay and which until very recently, as above pointed out, they have always paid upon importation into this country.

It is settled law that statutes should receive a sensible construction, one that is in harmony with the purposes of its enactment and will if possible avoid an unjust and absurd conclusion. *United States v. Riggs* (203 U. S., 136); *Lau Ow Bew v. United States* (144 U. S., 47, 59); *Church of Holy Trinity v. United States* (143 U. S., 457).

We advance to a consideration of the precise language of the paragraphs in question.

The importer says the term "clear almonds, shelled" has the same meaning as clear shelled almonds, and then by easy stages reaches the conclusion that it means only the clearest, cleanest, selected almonds that are the subject of commerce. The burden is upon him to sustain this contention.

Now, while the meaning of the word "clear" as used in the paragraph is not free from some doubt, and the purpose of Congress in placing it there is somewhat uncertain, if any deliberate purpose in so doing was entertained, we are of opinion it does not have the effect claimed by the importer. "Clear almonds" without the use of the further descriptive word "shelled" may mean almonds not shelled; that is, nothing but almond shells in their natural condition, including the meats or pits therein contained. The addition thereto of the word "shelled" would then mean such clear almonds in their natural condition with the shells removed. There is nothing in the record that tends to show that these importations were not before being shelled *clear almonds* in the sense above indicated, and there is nothing to show that the dirt, dust, and pieces of shell in these importations are not such as would naturally result from the shelling processes, whatever they may have been. In other words, no admixture of substances foreign to the clear almonds in the shell is shown to be present in these importations. On the other hand, Congress may have used the word "clear" in some other sense not suggested in this case and which it supposed was then applicable to the subject, or it may have used the word without intending thereby to make any change whatever in the meaning of the paragraph.

Says Lewis's Sutherland Statutory Construction, section 401, speaking of the rule that an amendment to a statute is not to be presumed to be without design:

Every change of phraseology, however, does not indicate a change of substance or intent. The change is often found to be the result of carelessness or slovenliness of the draftsman. The changes of phraseology may result from the act being the production of many minds and from being compiled from different sources. Hence the presumption of a change of intention from a change of language is of no great weight, and must mainly depend on the intrinsic difference as resulting from the modification. A mere change in the words of a revision will not be deemed a change in law unless it appears that such was the intention. The intent to change the law must be evident and certain; or it must be such substantial change as to import such intention, or it must otherwise be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention.

It is also well understood that unnecessary words are sometimes used in a statute evidently from an excess of caution, and it is not uncommon that words are sometimes used in a sense different than the meaning attributed thereto by lexicographers. An illustration of this may be found in paragraphs 283 and 272, above quoted, where the words "shelled or unshelled" are evidently used in contradistinction to each other, the former as referring to nuts with the shell on

and the other to nuts with the shell removed, and yet the word "un-shell," from which "unshelled" is derived, is uniformly defined by lexicographers as meaning to remove the shell from. It is, however, unnecessary to speculate what was the congressional intent evidenced by the use of the word "clear" so long as we are unable to attribute thereto the meaning urged by the importer.

If Congress had meant to impose a duty of 6 cents per pound only upon thoroughly cleaned and perfect almond meats, it were easy to have plainly so declared, and in view of the history of the tariff legislation on the subject, the administration thereof, and the principles of statutory interpretation to which reference has been made, we hold that failing to have so expressly declared the statute ought not to be so interpreted.

This conclusion makes it unnecessary to consider whether by his assignments of errors the importer has raised any question relating to the exclusion of evidence by the board or to consider whether there was error in such exclusion if that question were before us.

The result is that the judgment of the Board of General Appraisers is *affirmed*.

DE VRIES, Judge, did not sit in this case.

STERN BROS. v. UNITED STATES (No. 660).¹

APPRAISEMENT OF MERCHANDISE NOT IN PUBLIC STORES.

The leather bags of the importation in question were contained in cases that were not sent to the public stores for examination. The importer's contention is that the bags did not contain toilet articles, but were assessed for duty as if they did contain them. The goods having gone into consumption and the veracity of the witness who testified being unquestioned, it was sufficient proof of the actual character of the leather bags, when there was produced and submitted by the importer a memorandum known as a "stock list" that contained a complete and accurate description of the articles in question, with the cost and sale prices thereof. It was not necessary to corroborate this testimony by offering samples of the merchandise. The goods were dutiable at 40 per cent ad valorem under paragraph 452, tariff act of 1909. *Bradley Martin v. United States* (1 Ct. Cust. Appls., 134; T. D. 31185); *United States v. Hermann* (154 Fed. Rep., 196).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 25070 (T. D. 31405).

[Reversed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Chas. Duane Baker on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court :

This is an appeal from a decision of the Board of General Appraisers, and brings here for review a question of evidence. The merchandise

¹ Reported in T. D. 32167 (22 Treas. Dec., 65).

was ladies' hand bags, some of which were fitted with toilet bottles, others not.

On arrival of the importation at the port of New York the proper number of cases under section 2901 of the Revised Statutes were by the collector, as therein required, designated for examination by the appraiser. The appraiser duly examined these cases and packages, made his return to the collector, and duty was assessed upon the entire invoice, or at least the articles the subject of this controversy, at 50 per cent ad valorem under the provision of paragraph 452 of the tariff act of 1909, levying duty upon "cases of leather fitted with toilet articles."

The contention of the importer, who is appellant here, upon which chief reliance is made, is based upon the allegation that these bags did not contain toilet articles, and were therefore dutiable at the rate of but 40 per cent ad valorem under the same provision. The Board of General Appraisers overruled the protest.

The record develops the fact that the merchandise in question was contained in cases which were not sent to the public stores for examination, and were not before the appraiser for examination and return. The board states:

The only proof submitted is the statement of the person who bought the merchandise for protestants. She stated that all of the bags represented by the item numbers claimed upon had been sold and that therefore no sample could be produced, but she gave in detail a description thereof from a memorandum made at the time of importation. The Government offered no evidence and did not even cross-examine the witness, but nevertheless the board is not satisfied that the proof offered is sufficient to justify a reversal of the collector's action. Protestants had knowledge that case 3958, containing the bags in controversy, had not been designated for examination and was not therefore before the appraiser. If, then, with such knowledge, they failed to retain and present on the trial of the same representative samples thereof so that counsel for the Government might have the benefit of examination thereof and the opportunity, if desired, to present proof in contravention of witness's statement or in support of the collector's action, they have failed to meet the burden which rested upon them. To hold otherwise might result in a procedure which would place the Government in many instances at the mercy of unscrupulous importers.

The record discloses, as stated in the opinion of the board, that the buyer of the importing firm testified that she was familiar with the foreign invoices of the importing firm and the goods covered by them; that she saw the particular case when it arrived in the store; that she there and then made a memorandum of the kind of goods included therein, describing particularly each bag upon the invoice; that was the usual course of business of the house, and that she made a similar description of all of the goods in this line received by the importing firm. The memorandum was then produced and received in evidence. It is entitled "stock list," and it gives a detailed description, as stated by the witness, of every number included upon the invoice, as well as the invoice number, the cost price, and the selling price of each article of the merchandise. It is a list used by the importing firm in

the ordinary course of business in the selling of the goods; the descriptions therein made, in other words, are the basis of its purchases, sales, and profits. It bears internal evidence, not alone for these reasons, but by reason of the complete and accurate description of the imported articles that a close examination of each was made and an accurate description there registered. The cost prices are in letters, the sale prices in figures. It is such a document as would furnish upon cross-examination abundant evidence to test the correctness of the witness's testimony by comparing the cost prices upon the sale list with the cost prices upon the invoices and other corresponding descriptions of the merchandise. It is admitted that the goods have gone into consumption. The integrity of the witness is not questioned by Government counsel or the board. There is no finding by the Board of General Appraisers that the testimony of the witness did not impress the board or was not truthful.

The decision of the board is rested expressly upon the proposition that in such cases it is the duty of the importing firm to produce samples in court corroborative of their testimony, and that only this method will avoid against fraud by unscrupulous importers. We think this holding error. It reads into the law a condition precedent which is not only unwarranted by the law, but which imposes a condition upon importers which may prove absolutely destructive of business.

The question sought to be established by the importing firm is one surrounded by the statutes with no other limitations than the proof of any ordinary fact at issue. In many respects it is not dissimilar to the case of *Bradley Martin v. United States* (1 Ct. Cust. Appls., 134; T. D. 31185), decided by this court, wherein we said:

On the other hand, a witness is presumably truthful, and, if upon the uncontradicted external facts, themselves not unreasonable or incompatible with strict honesty of conduct, the only deduction which is consonant with such presumption is in favor of the person arriving, it becomes the duty of the courts to sustain his statement rather than to discredit it.

More properly in point is the decision of *United States v. Hermann* (154 Fed. Rep., 196), wherein the Circuit Court of Appeals, Second Circuit, in a similar case said:

Actual samples were not produced, and this evidence was based on the recollection of the witnesses as to the character of the goods represented by the invoice description of the various items, which had been imported two years or more previously. The Government urged that, in view of the failure of the importers to produce samples of the goods and the fact that the testimony of the importers was based on an inspection of the invoices, there was no competent evidence to sustain the conclusion of the Circuit Court.

The appellate court affirmed the decision of the Circuit Court without opinion over the contention of the Government in that case.

As no exceptional statutory requirements have been prescribed by the Congress in such cases as these, we must assume that it was not the intention of the legislative body to do so, and that the prescription of such a requirement is without warrant of law. Indeed, we

are unable to follow the principle to the conclusion that such a rule is necessary to obviate fraud upon the part of unscrupulous importers. We think such a rule would add no additional safeguard to the Treasury.

If the statutory or prescribed evidence necessary to establish the importer's case was that samples of the imported merchandise be produced, it would be far less difficult for the importer to produce at the hearing from his stock of merchandise or from samples held for that very purpose, samples fitting the case and testify that they were representative of the importation. The facility of that method would be so much easier of accomplishment, and the method and result so much more difficult of successful contravention on behalf of the Government than was the case here presented, that we are inclined to believe that it would open wider the door to fraud than is here presented. In this case there was not only the uncontradicted testimony of the witness who purchased the goods, but there is tangible evidence in the form of a written memorandum made at the time which contains in connection with the parol evidence sufficient elements of its integrity that it would be easy to test the same by the invoices and other records in the particular case. The Government tacitly accepted the authenticity of these by not opposing their introduction and not cross-examining the witness. The board likewise does not question the verity of either.

We are of the opinion that upon the unquestioned proof made the importer was entitled to a decision.

Reversed.

GODILLOT & Co. v. UNITED STATES (No. 680).¹

PICKLED CAPERS.

There is no limitation on the word "pickles" as used in paragraph 253, tariff act of 1909, and pickled capers are dutiable under it. In the presence of clear and explicit enactment, canons of construction have no application—*Microutsicos v. United States* (T. D. 32078).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7207 (T. D. 31496).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn and Geo. J. Puckhafer of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Wm. K. Payne, Deputy Assistant Attorney General, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings here for decision the dutiable classification of "capers" under the tariff act of 1909. The case is stated by the board in the following language:

The Court of Customs Appeals, in passing upon the classification of capers under 1897 (*Pierce v. United States*, T. D. 31215), held that they were not

¹ Reported in T. D. 32168 (22 Treas. Dec., 68).

vegetables, and therefore not embraced within the class of pickles provided for in paragraph 241. The court observed:

In accordance with all the lexicographic definitions they are, in fact, pickles, although they are excluded from those pickles provided for in paragraph 241 by the character of the pickles therein provided for. Accordingly this court is of the opinion that the merchandise is an article wholly or in part manufactured, and dutiable, as claimed by the appellant, as an unenumerated article in whole or in part manufactured, under the provisions of section 6 of the tariff act of 1897.

We are of the opinion that the provision for pickles in paragraph 253 of the new act is more general in its application than the provision in paragraph 241 of the act of 1897. It will be observed that the term "pickles" in paragraph 253 is unlimited; it is broad enough, we think, to cover all kinds of pickles, whether vegetables within the meaning of the tariff act or whether vegetable substances which are used for pickles.

The decision of the board is in precise accord with the very recent decision of this court. In *Microutsicos v. United States* (2 Ct. Cust. Appls., 342; T. D. 32078) this court, in speaking of the use of the word "pickles" in the language of the tariff act of 1909, and comparing the same with the use of that word in the act of 1897, observed:

It will be observed that the changed language of the act of 1909 in relation to this subject is something more than a mere rearrangement of words in the interest of order or form of expression. To the contrary, the change is material and goes to the substance of the classification. Whereas under the act of 1897, as well as the preceding ones, pickles had been directly classified as a kind or product of vegetables, now, after a period of litigation concerning the few kinds of nonvegetable pickles, the controlling enactment is changed so as to remove pickles from the vegetables paragraph and make them a class of themselves. *This seems to express a legislative intent to use the word in the sense of its common acceptance.* As stated in the above definition, pickles are generally composed of vegetables, but in a few instances might be nuts or like products. In this view the amended classification would make the preparation, characteristics, and use of the articles the determinative factors as to whether they were pickles, and would not arbitrarily limit the class to vegetable products only. It is well known that the word pickles in its ordinary meaning includes some few nuts and like articles which lend themselves readily to such preparation and use.

The contention of the importer is based upon the doctrine of *United States v. Beierle* (1 Ct. Cust. Appls., 457; T. D. 31506). Essentially, the conclusion is deduced from the legislative use of the words, "pickles," "vegetables," etc., in the various tariff acts preceding the existing law. That is a rule of construction adopted by the court in a case where, by the relation of the various provisions of the tariff acts *in pari materia*, it was deemed applicable. The changed provisions, however, of the tariff act of 1909 relative to this subject matter present a case of legislative expression that strongly and, as we have held, conclusively negatives the construction invoked. In the presence of clear and explicit enactment canons of construction have no application. At most a rule based upon inferential construction would not be held to obtain against the plain import of the language of the legislature, be that intent gathered from express words or correlated language.

Affirmed.

SCHRADER & EHLERS v. UNITED STATES Nos. 686 and 718).¹

FOUNTAIN-PEN BARREL NOT A PENHOLDER.

There is no question of commercial designation, and "penholder" as employed in the statute can not reasonably be held to include the rubber article of the importation. The language of paragraph 187, tariff act of 1909, clearly contemplates that fountain pens for tariff purposes should be distinguished as they are in fact and in common understanding from the ordinary penholder, and should be subject to a different rate of duty. The importations were dutiable as manufactures of hard rubber under paragraphs 450, tariff act of 1897, and 464, tariff act of 1909, respectively.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 25431 (T. D. 31543).

[Affirmed.]

Curie, Smith & Maxwell (John K. Maxwell, W. Wickham Smith, and Thomas M. Lane of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Charles D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

These two cases, one of which is an appeal from the Circuit Court for the Southern District of New York and the other an appeal from the Board of General Appraisers, involve the same questions.

The importation, the dutiable character of which is reviewed here upon the appeal from the judgment of the Circuit Court, was made under the tariff act of 1897, while that involved in the appeal from the judgment of the board was made under the act of 1909.

The merchandise under consideration is rubber holders for fountain pens composed of the ordinary separable rubber barrel, one part of which screws into the other, with a reservoir for holding ink therein, a feed barrel for conducting the ink to the pen, and a cap to cover the pen when not in use. In other words, it is an incomplete fountain pen, and all that is required to complete it ready for use is to put in the ink and put in place the pen.

In each case the importation was assessed as a manufacture of "hard rubber" under paragraph 450 and paragraph 464 of the respective acts. The importers claimed it to be dutiable under paragraph 187 of the act of 1897 and under paragraph 187 of the act of 1909, which are, respectively, as follows:

1897.—187. Penholder tips, penholders or parts thereof, and gold pens, twenty-five per centum ad valorem.

1909.—187. Penholder tips, penholders and parts thereof, five cents per gross and twenty-five per centum ad valorem; gold pens, twenty-five per centum ad valorem; fountain pens, stylographic pens, thirty per centum ad valorem; combination penholders, comprising penholder, pencil, rubber eraser, automatic stamp, or other attachment, forty per centum ad valorem: *Provided*, That pens and penholders shall be assessed for duty separately.

¹ Reported in T. D. 32169 (22 Treas. Dec., 70).

No question of commercial designation is made in either case, but it is claimed that under the provisions of both tariff acts the importations are penholders within the ordinary meaning of the paragraph cited.

The meaning of the word "penholder" is not difficult of ascertainment or understanding. In the *Century Dictionary* it is defined as follows:

A holder for pens or pen points. It consists of a handle or stock with a device for retaining the pens, usually a socket of metal.

Other lexicographers do not materially vary this definition.

In none of the dictionaries is it suggested that a penholder contains a reservoir or cavity for the holding of ink fitted with a device for furnishing a continuous supply of ink to the point of the pen. In this respect and also in respect of the provision made for protecting the point of the pen when not in use, namely, the cap, the importations manifestly differ from the penholder as that word is used in ordinary parlance.

We do not think the word "penholder" as used in the statutes fairly includes the merchandise in question. We think that the language of paragraph 187 of the act of 1909 clearly contemplates that fountain pens for tariff purposes should be distinguishable, as they are in fact and in ordinary understanding, from the ordinary penholder and subject to a different rate of duty. Unless such construction be given to paragraph 187 we are unable to see how force and effect could be given to the provisions therein relating to fountain pens.

It appearing that the merchandise is made of hard rubber it follows that the same was dutiable as assessed in each case.

The result is that the judgment of the Circuit Court in the one case and that of the Board of General Appraisers in the other is *affirmed*.

UNITED STATES *v.* WAKEM & McLAUGHLIN (No. 688).¹

"GLASS ROSETTES"—ARTICLES OF GLASS, COLORED.

The goods in controversy are small hemispherical glass insulators, to the glass of which in a melted state an amber color has been given by mixing appropriate coloring matter. From its terms and its legislative history, paragraph 98, tariff act of 1909, must be taken to cover all articles of colored glass not otherwise specifically provided for, and the colored glass insulators here are dutiable as assessed under that paragraph.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7220 (T. D. 31586).

[Reversed.]

Wm. K. Payne, Deputy Assistant Attorney General (*Chas. Duane Baker* on the brief), for the United States.

Lester C. Childs for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This case involves the classification of so-called "glass rosettes," which were assessed for duty by the collector of customs at the port

¹ Reported in T. D. 32170 (22 Treas. Dec., 71).

of Chicago at 60 per cent ad valorem as articles of glass, *colored*, under the provisions of paragraph 98 of the tariff act of August 5, 1909, the parts of which paragraph material to this case are as follows:

98. Glass bottles, decanters, and all articles of every description composed wholly or in chief value of glass, ornamented or decorated in any manner, or cut, engraved, painted, decorated, ornamented, *colored*, stained, silvered, gilded, etched, sand blasted, frosted, or printed in any manner, or ground (except such grinding as is necessary for fitting stoppers or for purposes other than ornamentation), and all articles of every description, including bottles and bottle glassware, composed wholly or in chief value of glass blown either in a mold or otherwise; all of the foregoing, not specially provided for in this section, * * * sixty per centum ad valorem. * * *

The importers objected to the duty assessed and among other grounds of protest set up the claim that the importation was a manufacture of glass or paste dutiable at 45 per cent ad valorem under the provisions of paragraph 109, which is as follows:

109. Stained or painted glass windows, or parts thereof, * * * and all glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, forty-five per centum ad valorem.

The Board of General Appraisers sustained the protest and the Government appealed.

The board finds, and it is not disputed, that the goods the classification of which is in controversy are small, hemispherical glass insulators designed for the effective insulation of telegraph, telephone, and electric light wires. These insulators are referred to in the record as "glass rosettes" and are made of a glass to which while in a melted condition a rich amber hue has been imparted by the admixture of some appropriate coloring matter. On this state of facts the Government insists that the insulators are articles of colored glass and therefore dutiable as assessed under that part of paragraph 98 which imposes a duty of 60 per cent ad valorem on "all articles of every description composed wholly or in chief value of glass * * * colored * * * in any manner." To this the importers respond that colored glass articles and articles of colored glass are commodities quite different from articles of glass colored, and that as paragraph 98 was intended to cover articles and not materials processed as therein described, articles made of glass colored in the melting pot can not be assessed for duty thereunder. In support of this proposition counsel for the importers aver that cutting, engraving, painting, decorating, ornamenting, staining, silvering, gilding, etching, sand blasting, frosting, and printing are all processes which are applied to the article itself rather than to the substance of which it is made and that it would be unreasonable to suppose that Congress had sought out *coloring* for a wider significance. This contention of the importers is in line with the decision of the board which held that every one of the processes enumerated in the paragraph under consideration implied an addition to the articles

of glass *after they had taken on their form as such* and that therefore its provisions were not applicable to articles made of a glass which had been colored while in a molten condition. From this it is apparent that the importers' case and the board's decision rest, first, upon the postulate that there is a distinction between the processing of an article and the processing of the materials of which it is composed, and, second, upon the assumption that it was the intention of the legislator that such a distinction should be drawn as to articles of glass, colored.

We have no fault to find with the general proposition that materials, at different stages of their development into articles, may be subjected by Congress to varying rates of duty or that articles of the same kind, made of the same material, intended for the same purpose, and bearing the same colors, devices, and designs, may be made to carry a different duty simply because such colors, devices, or designs have been evolved by different methods. When it comes, however, to the concrete case before us we can not persuade ourselves that in passing paragraph 98 Congress was moved by any such considerations or that it was at all concerned in making a tariff distinction between colored-glass articles, articles of colored glass, and articles of glass, colored. Moreover, we can not admit that "every one of the processes enumerated in the provision implies work done upon the glass articles after they have been given their form as such." Such an interpretation would in effect limit the operation of paragraph 98 largely to articles made wholly of glass, and would exclude from its provisions those articles in chief value of glass which, after they had taken on their final form, could not in the nature of things be processed as therein described. That is to say, glass bottles, decanters, and vases, cut, engraved, painted, frosted, stained, or etched, after having taken on the form of their ultimate use, would be subject to the duty of 60 per cent ad valorem prescribed by the paragraph, but glass chandeliers composed of faceted glass shapes, necessarily cut before and not after they became a part of the article, artistic lamp shades made of bits of glass necessarily stained before they were put in place, fancy lanterns, the glass panels of which were necessarily engraved, etched, or frosted before they were framed, and all other forms or shapes made up chiefly of fitted sections of colored, painted, stained, printed, frosted, cut, engraved, etched, silvered, or gilded glass, and not otherwise specially provided for, would be dutiable as manufactures of glass or as manufactures of which glass is the component of chief value at 45 per cent ad valorem.

In our opinion neither the wording of the statute nor its legislative history justifies any such distinction or discrimination. In paragraph 98 Congress was not considering *articles* which had been sub-

jected to the treatment and processes of manufacture therein defined, but articles the glass of which had undergone the operations mentioned. Paragraphs 97 to 109 of the act deal with glass and have for their object the laying of a duty on glass in various forms and conditions. It would seem, therefore, that what interested Congress in passing paragraph 98 was the imposition of a certain duty, not on cut, engraved, stained, painted, or colored articles, but on articles of cut, engraved, stained, painted, or colored glass.

Possibly neither the board nor counsel for appellees really intended to be taken as holding that the processes mentioned were superadded to articles of glass after they became articles, but rather that they were processes superadded to the glass after it became glass. If such, however, is to be the interpretation of their position, then there is no escaping the conclusion that it is the processing of the glass rather than the article which determines classification under the paragraph at issue, and once it is admitted that Congress had in mind the processing of the glass the paragraph itself affords no sufficient basis for the assumption that all the processes therein enumerated were intended to be applied to that material while it was in any special state or condition. True, the cutting, engraving, painting, staining, silvering, gilding, etching, sand blasting, frosting, printing, and grinding of glass are necessarily processes imposed upon the glass after it has solidified, but the fact that these processes are enumerated in the same paragraph which provides for "articles of glass, * * * colored * * * in any manner" hardly warrants the deduction that the operation of that particular portion of the paragraph is limited to articles the glass of which has been colored after it has left the melting pot. Such a deduction could be sustained only on the theory that the principle of *ejusdem generis* was in some way applicable to the paragraph, and that whether an article of colored glass was *ejusdem generis* with the other articles therein enumerated was wholly dependent on whether the glass had or had not hardened when the color was imparted. We are not ready to go that far, especially as it would involve an extension of the benevolent doctrine of *noscitur a sociis*, which we are not prepared to make. So far as we know there are but three distinct ways in which glass can be colored. It may be colored by mixing the pigment with the vitreous material while the latter is in a melted or semiliquid condition, in which case the color pervades the whole substance of the glass. It may be colored by staining, in which event the coloring matter is burned into the hardened surface but does not permeate the entire substance of the glass. It may be colored by painting or printing—that is, by simply spreading or imposing the colors on the surface in such a way that they do not become an integral part of the glass. With this as the state of the art of coloring glass it would

appear, therefore, that if any effect whatever is to be given to that part of the tariff act which provides for "articles of glass, * * * colored," it must be held to cover articles the glass of which is colored while in a fused or molten condition; or, to put it in another way, if all pot-colored glass is to be excluded from the paragraph, then, as a corollary to that proposition, it must be held that the provision therein for "articles of glass, * * * colored" is superfluous.

That goods made wholly or in chief value of glass colored in the pot were intended to fall under the cognizance of paragraph 98 of the tariff act of 1909 finds, we think, considerable support in the history of the tariff legislation here under consideration. The prototype of paragraph 98 of the present tariff act is to be found in the tariff act of 1862, which imposed a duty of 30 per cent ad valorem "on all plain and mould and press glassware, not cut, engraved, or painted," and a duty of 35 per cent ad valorem "on all articles of glass, cut, engraved, *painted, colored, printed, stained, silvered, or gilded.*" These provisions were repeated in the tariff act of 1864 with no change other than that required by a 5 per cent increase of duty, and under them the Treasury Department ruled, in 1873, that glass wine bottles, colored a dark brown, were properly classifiable as articles of glass, colored, and red glass wine bottles were subsequently put in the same category (T. D. 1667; T. D. 3991). In 1879 certain circular glass disks or rondelles, some ruby, some blue, some green, and some blue with a red center, were classified by the collector at New York as "articles of glass, colored" and assessed for duty at 40 per cent ad valorem. Upon the protest of the importers that the rondelles were "plain glass" the Treasury Department ruled that the goods were "articles of glass, colored" and sustained the collector (T. D. 4206). These rulings apparently held good until 1899, when they were overturned by reason of certain modifications accomplished by the act of 1894 in the law as it stood immediately prior thereto.

The following provisions of the tariff acts of 1883, 1890, 1894, and 1897 will show the changes which gradually crept into the law and brought about a classification of certain kinds of glassware which we think Congress sought to correct by introducing the modifications and syntactic transpositions evidenced by paragraphs 97 and 98 of the tariff act of 1909:

TARIFF ACT OF 1883.

SCHEDULE B.—Green and colored glass bottles * * * and other plain, molded, or pressed green and colored bottle glass, *not cut, engraved, or painted*, and not specially enumerated or provided for in this act, one cent per pound.

Articles of glass, cut, engraved, painted, colored, printed, stained, silvered, or gilded, not including plate-glass, silvered or looking-glass plates, forty-five per centum ad valorem.

* * * All other manufactures of glass or of which glass shall be the component material of chief value, not specially enumerated or provided for in this act, forty-five per centum ad valorem.

TARIFF ACT OF 1890.

103. Green, and colored, molded or pressed, * * * glass bottles, holding more than one pint, * * * and other molded or pressed green and colored * * * bottle glassware, not specially provided for in this act, one cent per pound. * * * (Like goods dutiable according to capacity.)

106. All articles of glass, cut, engraved, painted, colored, printed, stained, decorated, silvered, or gilded, not including plate glass silvered, or looking-glass plates, sixty per centum ad valorem.

108. * * * All other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum ad valorem.

TARIFF ACT OF 1894.

88. Green and colored, molded, or pressed, * * * glass bottles holding more than one pint, * * * and other molded or pressed green and colored * * * bottle glassware, not specially provided for in this act, three-fourths of one cent per pound. * * * (Like goods dutiable according to capacity.)

89. All articles of glass, cut, engraved, painted, colored, printed, stained, decorated, silvered, or gilded, not including plate glass silvered, or looking-glass plates, forty per centum ad valorem.

90. All glass bottles, decanters, or other vessels or articles of glass, when cut, engraved, painted, colored, printed, stained, etched, or otherwise ornamented or decorated, except such as have ground necks and stoppers only, not specially provided for in this act, including porcelain or opal glassware, forty per centum ad valorem. * * *

102. * * * All manufactures of glass, or of which glass is the component of chief value, not specially provided for in this act, thirty-five per centum ad valorem.

TARIFF ACT OF 1897.

99. Plain green or colored, molded or pressed, * * * glass bottles, * * * not otherwise specially provided for, * * * if holding more than one pint, one cent per pound; (like goods dutiable according to capacity): *Provided*, That none of the above articles shall pay a less rate of duty than forty per centum ad valorem.

100. Glass bottles, decanters, or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal, and other blown glassware, * * * sixty per centum ad valorem.

112. * * * All glass or manufactures of glass or paste, or of which glass or paste is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem.

A comparison of these several tariff enactments will show that in 1890 the word "decorated" was introduced for the first time into the provision for articles of glass, cut, engraved, etc. The provision thus amended was reenacted word for word in 1894 and then repeated in a modified form in an entirely new paragraph, known as paragraph 90, which imposed a duty on "articles of glass *when* cut, engraved, painted, colored, printed, stained, *etched, or otherwise ornamented or decorated*, except such as have ground necks and stoppers only." In 1897 paragraph 106 of the tariff act of 1890, which, with the exception of the rate, had been carried bodily into the tariff act of 1894 as paragraph 89, was eliminated and paragraph 90 of the

tariff act of 1894 was amended, first, by adding "silvering, gilding, and frosting" to the processes enumerated; and second, by striking out the words "except such as have ground necks and stoppers only" and inserting in lieu thereof *after* the word "decorated" the words "or ground (except such grinding as is necessary for fitting stoppers)." Notwithstanding these changes there seems to have been no question raised as to the classification of the merchandise imported under the modified provisions until the year 1899, when the Circuit Court of Appeals, in the case of *Koscherak v. United States* (98 Fed. Rep., 596), decided that the enumeration in paragraph 90 of the tariff act of 1894 of several processes, succeeded by the phrase "or otherwise ornamented or decorated," necessarily implied that only those articles of glass which had been ornamented or decorated by the processes so enumerated were within the terms of the paragraph. Following this decision, all articles of glass, cut, engraved, painted, colored, printed, stained, or etched for a utilitarian and not for an ornamental or decorative purpose were excluded from the operations of paragraph 90 of the tariff act of 1894 and its successor, paragraph 100 of the tariff act of 1897. *In re Eimer & Amend* (T. D. 22687); *in re R. Hoehn & Co.* (T. D. 24160); *in re R. Hoehn Co.* (T. D. 24514); *in re Hensel* (T. D. 26988); *Hempstead v. United States* (122 Fed. Rep., 752); *United States v. Hesse* (141 Fed. Rep., 492). Articles the glass of which was ground were held, however, to be subject to the provisions of those paragraphs without regard to whether such articles were or were not ornamented or decorated by the grinding. *McMullen v. United States* (123 Fed. Rep., 847).

As a result of the *Koscherak* decision it became necessary to determine in each case whether the effect produced by any of the enumerated processes, except grinding, was decorative or ornamental, and gradually there were developed certain deductions and conclusions which went somewhat farther than the original decision, but which were justified in a measure by its reasoning and by the exigent necessity of reconciling two provisions carrying different rates of duty for colored glass bottles.

In T. D. 23794 the board found as a fact that the coloring of certain glass beads did not amount to an ornamentation and that therefore, in accordance with the rule laid down in the *Koscherak* case, the beads were not dutiable under paragraph 100 of the act of 1897.

Then came T. D. 24547, in which the board held that a *plain black coloring* of glass could not be construed to be an ornamentation or decoration within the meaning of paragraph 100, and that inasmuch as paragraph 99 covered "plain green or colored glass bottles" *no plain color per se could be considered* as ornamental or decorative.

Then followed T. D. 24677, in which it was decided that glass pens made of white glass with black glass holders fused thereon, the color-

ing having been imparted during the making of the glass, were *plain colored glass* and therefore not ornamented or decorated.

In T. D. 24991 the board held that *a plain color was a single solid color*, and that 6,000 glass cubes, some colored red, some blue, others gilded, and all intended for the making of ornamental figures and designs for a church altar, were not dutiable as "articles of glass, * * * colored, * * * stained, * * * gilded, * * * or otherwise ornamented or decorated." See also T. D. 25509, T. D. 26111.

Finally, in T. D. 26933, the board decided that pendants for chandeliers made of glass, colored yellow in the pot, were within the reasoning of T. D. 24991, and that as they were *pot-colored and not colored by a superadded process* they might well be regarded as ornamental glassware, but certainly not as ornamented glassware.

From these cases it is evident that what bothered the tribunals charged with ascertaining the meaning of paragraph 90 of the tariff act of 1894 and paragraph 100 of the tariff act of 1897 was not whether the processes enumerated in those provisions were superadded or whether such processes were intended to be applied to the material rather than the article after it had taken on its form as such, but whether a resulting effect of such processes instead of the processes themselves should determine classification. Besides all that, the necessity of reconciling paragraph 88 with paragraph 90 of the tariff act of 1894 and paragraph 99 with paragraph 100 of the tariff act of 1897 had proved to be an awkward task. To give effect to conflicting provisions imposing different rates of duty on colored-glass bottles the board had started out with the proposition that no plain color *per se* could be considered ornamental or decorative. Subsequently a plain color had to be defined, and that was done by declaring it to be a single solid color. As single solid colors were imparted to the glass while it was melted, it was an easy step to the declaration that pot-colored glass, or glass not colored by a superadded process, was not ornamented or decorated glassware. During this period, however, neither the courts nor the board ever attempted to draw any distinction between "articles of glass, colored" and "colored-glass articles" or "articles of colored glass." Indeed, the difficulty of reconciling the paragraphs just mentioned lay precisely in the fact that the board recognized that "colored glass bottles" and "glass bottles, colored" were both articles of colored glass and that if any distinction was to be drawn between them it would have to be drawn on the basis of the effect of the coloring and not on the method of producing it. With this as the situation confronting Congress at the time the tariff act of 1909 was under consideration, we can not but think that the changes wrought by that enactment in paragraphs 99 and 100 of the act of 1897 were designed to meet the construction put upon those para-

graphs by the tribunals charged with their interpretation. Informed by the case of *McMullen v. United States* (123 Fed. Rep., 847) that the reasoning of the *Koscherak* case might be avoided by a mere transposition of words, Congress made the transposition and, as evidenced by paragraph 98 of the tariff act of 1909, articles of glass subjected to certain enumerated processes were put upon the same footing as articles of ground glass, that is to say, dutiable by reason of the process and without regard to the incidental effect produced. (Notes on Tariff Revision, pp. 114-117.) More than that, to emphasize its intention that the ornamental or decorative effect of the coloring should no longer be a factor in determining the classification of articles of colored glass Congress so modified that part of paragraph 99 of the tariff act of 1897 covering colored glass bottles that its operation in paragraph 97 of the new law was limited to such bottles as were of the character ordinarily employed as containers for the holding or transportation of merchandise. This change did away with the apparent conflict theretofore existing between paragraphs of the law presumptively entitled to equal consideration, and so identified the colored glass bottles covered by one provision as to make it comparatively easy to distinguish them from those covered by the other. From its language and legislative history we are satisfied that paragraph 98 of the tariff act of 1909 was intended to cover all articles of colored glass not otherwise specifically provided for, and that therefore the colored glass insulators here in question were dutiable as assessed by the collector.

The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* ZINN & Co. (No. 703).¹

BASKETS OF STRAW, WILLOW, RATTAN, AND WOOD, LINED WITH SILK.

"Baskets" is a term, descriptive *eo nomine*, and the sole requirement needed to bring "baskets" within the provisions of paragraph 214, tariff act of 1909, is that they should in fact be the articles there described, namely, baskets made of bamboo, wood, straw, or compositions of wood.—*Thomsen v. United States* (T. D. 31590.)

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7221 (T. D. 31587).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Charles Duane Baker* on the brief), for the United States.

Walden & Webster (*Henry J. Webster* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise, imported during the month of October, 1909, consisted of certain baskets composed of straw, willow, rattan, and

¹ Reported in T. D. 32171 (22 Treas. Dec., 79).

wood. All of such baskets were colored or stained, and were in each instance lined and padded with silk. An analysis of the original material of which the basket as thus lined was composed showed the chief value of the raw material to be silk. It does not appear that the value of the lining exceeded that of the finished basket. The appraiser returned these baskets as "manufactures of straw, wood, grass, cotton, and silk." They were assessed for duty as "manufactures of silk, silk chief value," at 50 per cent ad valorem under paragraph 403 of the act of 1909, which is as follows:

All manufactures of silk, or of which silk is the component material of chief value, including such as have india rubber as a component material, not specially provided for in this section, fifty per centum ad valorem: *Provided*, That all manufactures of silk enumerated under any paragraph of this schedule, if composed in any part of wool, shall be classified and assessed for duty as manufactures of wool.

The importer protested against this assessment, and on appeal to the Board of General Appraisers the protest was sustained. The claim asserted by the importers was that the merchandise was dutiable as "baskets of wood, willow, rattan, straw, stained," under paragraph 214 of the act of 1909, which is as follows:

Porch and window blinds, baskets, curtains, shades, or screens of bamboo, wood, straw, or compositions of wood, not specially provided for in this section, thirty-five per centum ad valorem; if stained, dyed, painted, printed, polished, grained, or creosoted, forty per centum ad valorem.

The Government appeals from this decision. The sole question presented is as to which of these two paragraphs is the more specific as applied to the case in hand.

In the case of *Thomsen v. United States* (2 Ct. Cust. Appls., 37; T. D. 31590) we had before us the question of the relative specificity of the two paragraphs 214 and 463. Paragraph 463 imposes a duty of 35 per cent ad valorem upon "manufactures of bone, chip, grass, horn, quills, india rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or any of them is the component material of chief value, not specially provided for in this section." It was claimed that as this paragraph provided for the manufactures of chip and made them dutiable at 35 per cent ad valorem, it was more specific than paragraph 214, which related to baskets of wood. But the court answered this contention as follows:

The term "baskets," being the name of the article, seems clearly to be a more exact and specific designation of them than the term "manufactures." This latter term in this application is one of general description only. The fact that the component material is more specifically described in the second paragraph does not conflict with this conclusion, for nevertheless the term baskets is the exact and specific name of the article itself.

See also *Brody v. United States* (2 Ct. Cust. Appls., 15; T. D. 31573); *Krauss v. United States* (2 Ct. Cust. Appls., 17; T. D. 31574).

The Board of General Appraisers relied for its decision upon the two cases of *Hempstead v. United States* (168 Fed. Rep., 450), and *Woodruff v. United States* (168 Fed. Rep., 452). These cases presented a question analagous in principle to that here involved. In the *Hempstead* case the importation was a table, ornate in design, whose framework and principal bulk were of wood, while its decorations consisted partly of paint and partly of brass work either inlaid or affixed. The importers conceded that the brass work was the component material of chief value, and the Board of General Appraisers classified the merchandise under paragraph 193 of the tariff act of 1897 as an article "composed wholly or in part of metal, whether partly or wholly manufactured," and assessed the duty at 45 per cent ad valorem. The paragraph under which the assessment was made contained the qualifying clause "not specially provided for in this act," as did also the competing paragraph 208, which reads as follows:

House or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act.

The court first eliminated the phrase "of which wood is the component material of chief value" by holding that it qualified only the term "manufactures of wood," leaving the provision as though it had read, "house or cabinet furniture of wood, not specially provided for in this act." The court held that "house or cabinet furniture of wood" was more specific than the phrase "composed wholly or in part of metal, whether partly or wholly manufactured," although it appeared that the brass work on the article imported was the component material of chief value. The case is clearly in point to sustain the ruling of the board.

The case of *Woodruff v. United States* was a case where the competing provisions were, "cloths, knit fabrics, and all manufactures of every description made wholly or in part of wool, not specially provided for in this act," and the same paragraph (208) involved in the *Hempstead* case. The Government also relied in that case upon the silk paragraph, in terms substantially like that above quoted, but the court followed the decision of Judge McPherson in the *Hempstead* case and held that "house or cabinet furniture, of wood," was more specific than either of the contesting provisions.

The present case is clearer than either the *Hempstead* or the *Woodruff* cases. "Baskets" is an *eo nomine* term, and it would seem that the only requirement to bring it within the terms of paragraph 214 is to say that it is in fact the article described, namely, a basket composed of bamboo, wood, straw or compositions of wood. If so, it is specifically provided for.

That willow and rattan are each a kind of wood has been determined. *Brody v. United States* (2 Ct. Cust. Appls., 15; T. D. 31573) and *Foppes v. United States* (72 Fed. Rep., 45).

We think the case is ruled in principle by *Thomsen v. United States* (2 Ct. Cust. Appls., 37; T. D. 31590), and the decision of the Board of General Appraisers is *affirmed*.

OVERTON & Co. v. UNITED STATES (No. 705).¹

SURFACE-COATED PAPER WITH LITHOGRAPHICALLY PRINTED COLORED DESIGNS.

The merchandise consisted of sheets of paper lithographically printed with colored designs, and not exceeding eight one-thousandths of an inch in thickness. Paragraph 412, tariff act of 1909, contains unmistakable evidence that Congress intended to name the exceptions to its application, and that apart from those exceptions it was meant to cover, as is there expressly declared, articles composed wholly or in chief value of paper lithographically printed, in whole or in part, whether such articles are or are not *ejusdem generis* with those first designated. The merchandise is dutiable under that paragraph.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7231 (T. D. 31653).

[Affirmed.]

Churchill & Marlow (Wm. A. Hines of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise here is sheets of paper about 32 by 43 inches in size, under eight one-thousandths of 1 inch in thickness, having a coated surface embellished with floral designs in various colors, lithographically printed. These embellishments are called running designs, and represent roses, apple blossoms, or other floral subjects, and are repeated throughout the dimensions of the sheet. The sheets are intended to be cut into various smaller sizes for the purpose of covering and ornamenting boxes or for lining books. It is invoiced as fancy papers, and was assessed for duty at 20 cents per pound under paragraph 412 of the act of August 5, 1909, as lithographic prints under eight one-thousandths of 1 inch in thickness. We insert here the material portions of that paragraph:

412. Pictures, calendars, cards, labels, flaps, cigar bands, placards, and other articles, composed wholly or in chief value of paper, lithographically printed in whole or in part from stone, metal, or material other than gelatin (except boxes, views of American scenery or objects, and music, and illustrations when forming part of a periodical or newspaper, or of bound or unbound books, accompanying the same, not specially provided for in this section), shall pay duty at the following rates: Labels and flaps, printed in less than eight colors, * * * but not printed in whole or in part in metal

¹ Reported in T. D. 32172 (22 Treas. Dec., 82).

leaf, * * *; cigar bands of the same number of colors and printings, * * *, labels and flaps printed in eight or more colors, but not printed in whole or in part in metal leaf, * * *; cigar bands of the same number of colors and printings, * * *; labels and flaps, printed in whole or in part in metal leaf, * * *; cigar bands printed in whole or in part in metal leaf, * * *; all labels, flaps, and bands not exceeding ten square inches cutting size in dimensions, if embossed or die-cut, * * *; booklets, * * *; books of paper or other material for children's use, not exceeding in weight twenty-four ounces each, * * *; fashion magazines or periodicals, * * *; booklets, * * *; decalcomanias in ceramic colors, weighing not over one hundred pounds per thousand sheets on the basis of twenty by thirty inches in dimensions, * * *; weighing over one hundred pounds per thousand sheets on the basis of twenty by thirty inches in dimensions, * * *; if backed with metal leaf, * * *; all other decalcomanias, except toy decalcomanias, * * *; all other articles than those hereinbefore specifically provided for in this paragraph, not exceeding eight one-thousandths of one inch in thickness, twenty cents per pound; exceeding eight and not exceeding twenty one-thousandths of one inch in thickness, and less than thirty-five square inches cutting size in dimensions, eight and one-half cents per pound. * * *

The importers duly protested, claiming that the merchandise should have been classified under that part of paragraph 411 of the same act, which here follows:

411. Papers with coated surface or surfaces, not specially provided for in this section, five cents per pound; * * * or if embossed or printed, five cents per pound and twenty per centum ad valorem. * * *

The Board of General Appraisers overruled the protest and sustained the assessment.

The substance of the importers' contention is that paragraph 412 is specifically applicable to "pictures, calendars, cards, labels, flaps, cigar bands, placards, and other articles composed wholly or in chief value of paper, lithographically printed in whole or in part;" that the familiar doctrine of *ejusdem generis* requires that such "other articles" must be of the same class as those specifically named; that the merchandise here is not such; and that the intent of Congress when the two paragraphs are considered was manifestly to exclude paper with a coated surface printed by lithographic or other process from the application of paragraph 412.

The Government contends in substance that the merchandise being paper concededly printed by lithographic process which has produced thereon pictures of flowers is specifically covered by the paragraph, and, further, that if this is not so found the merchandise is nevertheless *ejusdem generis* with the other articles embraced within said paragraph 412.

The doctrine of *ejusdem generis* is one frequently invoked in the interpretation of statutes and may be applicable whenever a doubt arises as to whether a given article not specifically named is to be placed in a class of which some of the individual subjects are named. As often stated, it is that where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described.

This rule is one of construction only and is invoked as an aid in arriving at the real legislative intent. It is designed at the same time to preserve the meaning of the particular words as well as to give to the general words an interpretation consistent with the manifest purpose of the entire act. It is not to render the general words meaningless or to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. *United States v Mescall* (215 U. S., 26).

We think a careful reading of the entire paragraph indicates that Congress intended to include thereunder all lithographically printed paper, unless it is specifically otherwise provided for elsewhere, and that the particular articles first mentioned in the paragraph are not words of limitation in view of the treatment given to the whole subject matter of lithographic prints.

In its beginning the paragraph in effect declares it shall apply to certain named and other articles composed in whole or in chief value of paper lithographically printed in whole or in part, and as indicating the meaning to be attached to the words "other articles" immediately proceeds to say that boxes, views of American scenery or objects, and music, etc., shall not be included in such "other articles."

Now, if the importers' claim that the "other articles" must be strictly *ejusdem generis* with those that immediately precede be sound, it follows that boxes and music, lithographically printed, need not have been specially excepted by Congress. They can hardly be claimed to be *ejusdem generis* with calendars, cards, labels, flaps, cigar bands, and placards, and so under the rule invoked would have been excepted if not mentioned.

Congress evidently understood it had used the words "other articles" in a larger sense than the class immediately preceding, and that their meaning was not to be limited thereby.

This conclusion seems supported and strengthened by and necessary to give full force and effect to the expression used later in the paragraph that "all other articles than those hereinbefore specifically provided for in this paragraph" shall be dutiable at certain rates which are governed and determined by the thickness or the thickness and superficial area of the article itself.

Intervening between this clause and the first part of the paragraph Congress had proceeded to fix duties upon "booklets," "books of paper or other material for children's use," and "fashion magazines or periodicals," any one of which would not seem to be *ejusdem generis* with the articles first *eo nomine* designated, but which it refers to manifestly as some of the "other articles" lithographically printed, wholly or in chief value of paper, in the first clause of the paragraph. It then concludes by declaring that "all articles other than those hereinbefore specifically provided for" in the paragraph,

which must include lithographically printed articles composed wholly or in chief value of paper, shall be dutiable at the rates immediately thereafter provided.

We think this paragraph contains unmistakable evidence that Congress designed to point out therein the exceptions to its application and shows that aside from such exceptions it was designed to apply, as it expressly states, to articles composed wholly or in chief value of paper lithographically printed in whole or in part, whether such articles are or are not *ejusdem generis* with those first denominatively mentioned. In other words, the paragraph discloses its own rule of construction and renders that of *ejusdem generis* inapplicable.

This merchandise, being composed of sheets of paper lithographically printed and being aptly described as articles not hereinbefore specifically provided for in the paragraph and not exceeding eight one-thousandths of 1 inch in thickness, is properly dutiable as assessed.

We have not omitted to consider the reference made in importers' brief to the proceedings in Congress which finally resulted in the enactment of these paragraphs, but our view of the case as above indicated renders further reference thereto unnecessary.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES v. TAMM & Co. (No. 711).¹

1. "COMPOSED OF."

"Composed," in paragraph 95, tariff act of 1909, does not imply that an article to be "composed" must be made of more than one substance; an article may be composed of a single substance.

2. "MINERAL SUBSTANCES."

Nor does the phrase "mineral substances" in the same paragraph mean substances in the plural, to the exclusion of substance in the singular. The solid flint glazing stones of the importation are dutiable under that paragraph as articles or wares composed wholly or in chief value of earthy or mineral substances.—*Salomon v. United States* (T. D. 31635).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7235 (T. D. 31705).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Leland N. Wood* on the brief), for the United States.

Brown & Gerry for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise here involved, as represented by the official exhibit, is a solid piece of flint stone, circular in shape, having a diameter of a little more than 3 inches and a length of a little more

¹ Reported in T. D. 32173 (22 Trans. Dec., 85).

than 2 inches. The periphery is polished.' The ends have been smoothed but not polished. It is a glazing stone used for glazing papers, but the method of its use is not disclosed. It was assessed for duty under the provisions of paragraph 95 of the tariff act of 1909, the material part of which reads as follows:

95. Articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, thirty-five per centum ad valorem. * * *

Under their protest the importers claim the merchandise to be dutiable as a nonenumerated article manufactured in whole or in part under the provisions of paragraph 480 of the same act. The Board of General Appraisers sustained the protest and the case is duly here for review.

The first contention of the importers is that the proper construction of paragraph 95 requires an article to be composed of more than one earthy or mineral substance to warrant its classification and assessment thereunder. The appellees further contend that this importation, which they concede is a flint stone, manufactured, is not a manufacture of flint stones and also that it is not articles and wares within the meaning of paragraph 95.

We think the statute should receive the same construction as if it read "an article or a ware composed wholly or in chief value of an earthy or mineral substance," etc. It is true the plural term "mineral substances" is used, but this is obviously because "articles and wares" are also used in the plural form.

Manifestly, the importation here is an "article" in the common acceptance of the meaning of that word. The meaning of the term "composed of" as used in paragraph 95 does not seem to be involved in any doubt. By lexicographers, as well as by people generally, we think one of its meanings is "made of, made up of, consisting of"; not only this, but such appears to be the common meaning attributed by Congress to the term in various sections of the tariff act. To illustrate, paragraph 98 relates to articles of every description "composed wholly or in chief value of glass"; paragraph 112 relates to "all articles composed wholly or in chief value of agate, rock crystal, or other semiprecious stones"; paragraph 188 relates to pins "composed wholly of brass, copper, iron, steel, or other base metal"; paragraph 339 relates to "cordage composed of istle, Tampico fiber, manila, sisal grass, or sunn"; paragraph 448 relates to articles composed of silver, German silver, white metal, brass, gold, and platinum; paragraph 462 relates to pipes or pipe bowls "of whatever material composed"; and many other instances of a like meaning being obviously applied to the term "composed of" may easily be found in the tariff act. These demonstrate clearly that in the tariff act the term "composed of" is used in the sense we have above indicated, and we find no warrant for holding it is not its meaning in paragraph 95.

This is but a reiteration of what we said in *Salomon v. United States* (2 Ct. Cust. Appls., 92; T. D. 31635), where it was held, referring to the same language, that its plain meaning was "articles or wares made up of a mineral substance."

Applying this construction to the paragraph and to the importation, these glazing stones are clearly composed of a mineral substance, for it is not contended that flint is otherwise than a mineral substance.

The Board of General Appraisers considered that the collocation of paragraph 95 strengthened their conclusion that the term "composed of" as there used related to the combining of several mineral substances or the combination of one or more mineral substances with other substances.

We do not think this can be said of paragraph 95 with any greater force than it might be urged respecting some other paragraphs to which we have referred and in which manifestly the term "composed of" contemplates that the article may be composed of only one substance, but which it seems unnecessary to specially discuss.

We hold that the merchandise was dutiable as assessed, and so holding it becomes unnecessary to consider whether the exhibit here is or is not a flint stone, manufactured, because it is dutiable under paragraph 95 as composed of a mineral substance.

The result is that the judgment of the Board of General Appraisers is *reversed*.

DE VRIES, Judge, did not sit in this case.

GAGE BROS. & Co. v. UNITED STATES (No. 712).¹

ARTIFICIAL FLOWERS, POMPONS, PAQUETS, ETC.

Where artificial flowers, leaves and the like, have taken on, through the use of metal wire in their construction, a new form and shape and name, they are to be deemed manufactures of metal; and in the present case, where the evidence is sufficient to show that a particular part of the consignment falls within this rule, the board's holding as to this part is modified; but proof failing as to the real character of the remainder of the consignment, the board's ruling as to this will not be disturbed.—*United States v. Downing* (1 Ct. Cust. Appls., 337; T. D. 31434).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 25774 (T. D. 31575).

[Modified as to part, affirmed as to part.]

Isidore Fried and Lester C. Childs for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. K. Payne*, Deputy Assistant Attorney General, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This was an importation of artificial leaves, grasses, flowers, stems, pompoms, paquets, etc., at the port of Chicago. They were classified

¹ Reported in T. D. 32174 (22 Treas. Dec., 87).

for dutiable purposes at that port under the provisions of paragraph 425 of the tariff act of 1897, which read as follows:

425. Feathers and downs of all kinds, including bird skins or parts thereof with the feathers on, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this act, fifteen per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, including quilts of down and other manufactures of down, and also dressed and finished birds suitable for millinery ornaments, and artificial or ornamental feathers, fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this act, fifty per centum ad valorem.

The importers make the contention that they should be rated for dutiable purposes as "manufactures in part of metal" under the provisions of paragraph 193 of the same act.

The principle of law involved in this case was settled by this court in *United States v. Downing* (1 Ct. Cust. Appls., 337; T. D. 31434), wherein the decisions rendered by the United States Circuit Courts of Appeals for the Second and Third Districts were reviewed and a principle of decision enunciated.

In that case this court said:

As we read paragraph 425, and particularly the latter portion thereof, it is limited to feathers, fruits, grains, leaves, flowers, and stems or parts thereof, *and does not extend to any manufactures made up of these*. Whenever, therefore, an imported article is to be classified for duty as one of these articles it must be at least substantially within the enumerations of the statute. These importations, however [which consisted of burial and bridal wreaths made up of artificial flowers in part of metal], have passed beyond that category; they are now substantially in part of metal. They have taken on new form and shape and a new name. They are manipulations, and manufacture has devoted them to specific purposes. That manufacture has employed in its use another material, to wit, metal, which, in a substantial, if not a controlling factor, has given shape, form, name, and determined the use of the imported article.

This decision was based upon the doctrine laid down by the Supreme Court in *Seeberger v. Schlesinger* (152 U. S., 581, 587).

The chief difficulty in this case concerns the application of the decision quoted to the facts as proven in this record. The record covers many protests and more invoices.

Several samples said to be *illustrative* of the imported merchandise were introduced, to wit, 10 in number, and marked "Illustrative Exhibits A to J, inclusive." While there was the sweeping declaration upon the part of one of the witnesses for the importing firm that they were illustrative of the entire importations, the record further discloses that that is not accurately true; and the same witness later on, under direction of the Board of General Appraisers to segregate upon the invoices those items which were represented by these samples, or any of them, and those which were not so represented, submitted lists covering but a part of these invoices, which lists as stated purported to designate the goods upon these invoices which are represented by the illustrative samples mentioned. The record indicates that upon

the lists there are many items which are not represented by these illustrative exhibits, but which are simply artificial flowers, leaves, or grasses.

The Board of General Appraisers sustained the decision of the collector as to the whole. Under the doctrine of *United States v. Downing* this was clearly error as to a part of the importations.

The 10 illustrative exhibits referred to offer a variety of manipulations of artificial flowers, the most pronounced form being that of wreaths made up of artificial flowers, buds, and leaves, which, in addition to the wire entering into the individual flower, bud, or leaf, has added thereto the necessary wire to bring them into the form of a wreath of suitable proportions for manufacturing purposes, and of an artistic design. In fact, the undisputed testimony in the record is that all of these exhibits are assembled into artistic forms. The simplest exhibit is that of a paquet, so designated by the manufacturers who testified, and which in ordinary parlance would be understood as a bouquet. As to these, the uncontradicted testimony in the record is that they consist of artificial roses and other flowers, buds, and leaves assembled in an artistic manner, in accordance with an approved design, and that in the condition as imported they are ready for use as paquets for millinery uses. In each of these, in addition to the wires used in the formation of the individual flowers, buds, and leaves, there is added thereto the necessary metal wire to assemble the individual parts of the paquet, and to give it that shape and form and preserve the same, constituting the desired design, and make the same ready for its ultimate use.

The case, like many other customs cases, presents a difficult problem in the determination of exactly where to place the dividing line between the artificial flower *per se* and a manufacture of such.

It is to be borne in mind in measuring the term manufacture, when used with reference to such articles, that the only manufacture to which artificial flowers, grasses, etc., are subjected is a manufacture into precisely such articles, for that is the condition of ultimate consumption. The testimony is uniform that each and every one of these illustrative exhibits is the subject of artistic manipulation in accordance with a design controlled by the seasons and fashions, and which makes the composite value of the completed article greater than the aggregate integral values of its components. While the line of demarcation between a paquet and bouquet of artificial flowers branched, assembled, and bound in place and shape after a particular design by metal wire and any ornamental flower is very narrow and is the work of small labor and cost, it is nevertheless the same and only line of demarcation which distinguishes the classification between more expensive wreaths, pompons, and other admittedly manufactured articles. It is not for the court to ignore the principles of construction and accepted lines of demarcation because

thereby an undue advantage accrues to the importer in a particular case by reason of a slight differentiation.

The stability and certainty of business enterprise is dependent in no class of cases more than in customs cases, where minute points of distinction abound, upon a stable adherence by the courts to plain, unmistakable, and well-settled rules of distinction regardless of peculiar consequences in exceptional or particular cases. It is the better part of wisdom, and indeed vital to business undertakings, that distinctions of law and rules of decision be fixed and invariable, that the business world may understand and know upon what lines they may transact business, and that in their business transactions they will not be visited by unforeseen and harsh results.

In the particular cases the schedule of protests embraced within the petition for review in this court includes six protests. These protests, it is stated in the record, cover numerous invoices.

. We do not think the testimony of the importers' representative that the 10 samples introduced cover the entire invoices sufficiently accurate for reliquidation. This is particularly true in view of the fact that upon cross-examination, and careful examination of some of the invoices, the same witness testified that there were many items on these invoices covered by these protests and decision of the board which were not represented by these samples, but which, as he stated, were individual artificial flowers, leaves, buds, etc. The principle of the Downing case, *supra*, applies only to those individual flowers, buds, leaves, wreaths, etc., which had been manufactured into articles ready for ultimate use as above stated and which in these cases have taken a new name, such as "paquets," "wreaths," etc.

The lists, which were prepared by the witness under the direction of the board, related only to the invoices covered by protests 358438 and 358439, and are marked Exhibits 1 and 2 in the record. The witness, however, further testified that certain indicated numbers upon the invoices were represented by certain of these illustrative exhibits, for example, Exhibit H represents item 3288 and Exhibit J represents item 3196.

We think that the merchandise covered by these invoices, which is represented by these illustrative samples, or any of them, is properly dutiable as manufactures in part of metal, as claimed by the protestant, but in view of the record and the failure of the importers to establish the items upon some of the invoices represented by such samples and exhibits reliquidation can not proceed further than the items which have been positively identified and proven as above stated, the decision of the board as to these items is reversed. As to all other items it is affirmed for lack of sufficient testimony to overcome the presumption of correctness attending the collector's decision.

modified.

SALOMON BROS. & Co. *et al.* *v.* UNITED STATES (No. 729).¹

JUTE UNMANUFACTURED—ENTRY FREE.

The merchandise consists of broken fibers of undressed raw jute rejected by the carding machine in the first process of manufacture. These broken fibers had been later subjected to a carding process of their own. The product is more accurately described as jute, unmanufactured, than as waste not specially provided for and was entitled to free entry under both tariff acts of 1897 and 1909.—*United States v. Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198; T. D. 31237).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7242 (T. D. 31739).

[Reversed.]

Searle & Pillsbury (Wm. E. Waterhouse of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Wm. A. Robertson on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The tariff act of 1897, in paragraph 463, imposed a duty upon waste not specially provided for of 10 per cent ad valorem. Paragraph 479 of the act of 1909 is identical.

Paragraph 566 of the act of 1897 reads as follows:

Grasses and fibers: Istle or Tampico fiber, jute, jute butts, manila, sisal grass, sunn, and all other textile grasses or fibrous vegetable substances, not dressed or manufactured in any manner, and not specially provided for in this act.

This paragraph appears in the free list. The corresponding paragraph in the act of 1909 is identical with this with the exception that the word "section" is substituted for the word "act."

The merchandise covered by the protest in this case was imported at different times, a portion during the life of the act of 1897 and the remainder under the act of 1909. It was all assessed for duty under the provisions first above quoted for waste not specially provided for. It is claimed to be more specifically provided for as jute not dressed or manufactured in any manner and entitled to free entry. The board overruled the protest, and the importer appeals.

The merchandise in question consists of jute card waste, so called, and consists of the broken fibers of undressed raw jute which are rejected by the carding machine in the first process of manufacture to which undressed jute is subjected. The evidence discloses that in carding raw jute the carding machine picks up the longer filaments of the jute and that the short fibers and those which are inferior are rejected by the pins of the machine. It is this rejected substance which is in controversy here. The substance is unquestionably jute. It is inferior to the parent substance, however, in quality. But the

¹ Reported in T. D. 32196 (22 Treas. Dec., 109).

evidence discloses that it may be devoted to the same uses to which the substance resulting from the first carding is devoted. It may be spun, or it may be felted, or it may be used without further manipulation for stuffing horse collars.

The evidence further discloses that before it can be put to the use of spinning it must be again recarded and the product of this recarding is that which is used for spinning. The so-called jute card waste is necessarily much cheaper than the natural substance, as the better part of it has been extracted.

Does the fact that this substance, which is called in one sense a waste, make it dutiable, or does it come, so long as it retains its native characteristics of jute and is susceptible of the same uses, more properly under the provisions of paragraph 566 of the tariff law of 1897 and paragraph 578 of the law of 1909, respectively?

We think the case of *United States v. Hatters' Fur Exchange* (1 Ct. Cust. Appls., 198; T. D. 31237) rules this question. In that case the court had under consideration fur gathered as scraps or waste from the first treatment of skins. It was claimed to be dutiable as waste not specially provided for, under paragraph 463 of the act of 1897. It was shown, however, that it could be used as undressed fur. After reviewing the evidence in the case, the opinion, by Judge Hunt, proceeds:

With this evidence before the court, the case has been somewhat simplified by the fact that counsel for the respective parties agree generally that it proves the articles involved to be a waste. We can therefore move forward upon this assumption and at once proceed to the question whether, being waste, they are clippings or refuse scraps and pieces, dutiable merely as waste not specially provided for, or whether, although waste, they are yet articles of undressed fur specially provided for under the paragraphs of the tariff act of 1897, heretofore quoted.

* * * * *

The finding of the Circuit Court that the articles are undressed clippings of rabbit skins and portions of fur that have become detached from the pelt by reason of heat and other means is amply sustained by the evidence, and, as was said by Judge Martin, the evidence shows that they are all "used for the same purpose to which the skin as usually cut up is employed, and that it comes from the rabbit pelt, which of itself is treated as free under the tariff act."

It is waste in a sense—that is, it is primarily a refuse in so far as the first treatment of the skin goes, and it may be that the object of the first treatment of the skins is not to obtain this refuse; it is a residuum. But, on the other hand, it is not at all a worthless quantity, as it has a commercial value for use in hat making and is imported for such purposes. The intent of the tariff law of 1897 was explicitly expressed by providing for free entry of skins and furs undressed, and it would seem to us that it was not meant to impose duty upon pieces or inferior kinds of furs, themselves valuable, and gathered as the scraps or waste from the first treatment of the skins, for they are still furs undressed.

It is equally true in the present case that the merchandise involved is in one sense a waste. It is a residuum after the first treatment of the native product. But, as in the case referred to, this residuum is

not a worthless quantity. It has a commercial value and is used for the purpose which the better quality is devoted to, except that it produces an inferior article. We think that case is decisive of this point.

So in *Patton v. United States* (159 U. S., 500), Mr. Justice Brown, after reviewing the definitions of waste found in the dictionaries, concludes:

The prominent characteristic running through all these definitions is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchandise and used for purposes for which merchantable material of the same class is unsuitable.

In *Myers v. United States* (110 Fed. Rep., 940) the court held that mica in small pieces or sheets which fall off in the process of thumb trimming are dutiable as mica unmanufactured, and not as waste not specially provided for. The court said:

The merchandise does not lose its character as merchantable mica because it is of an inferior grade. The material called "waste" at the mica mines is refuse thrown out on the dumps, having little value and being incapable of use for any of the purposes for which mica is used.

It is contended that even if this be held to be jute waste it is not free because it has been dressed. The evidence discloses that the first process of carding is not with the purpose of getting this substance. The carder does not desire to get any. But it comes about from the presence of inferior fibers. It is a by-product and not the substance sought, just as was the case in the *Hatters' Fur Exchange case, supra*. But what is more significant is the fact that before it can be devoted to the same purpose that the superior quality is, namely, spinning, it must be subjected to a new process of carding and treated in precisely the same manner that the native substance is required to be treated.

Authoritative rulings are not wanting upon this question. In *Seeberger v. Castro* (153 U. S., 32) tobacco scrap consisting of clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture, not being fit for use in the condition in which the same are imported, were held to be dutiable as unmanufactured tobacco. And in the case of *Patton v. United States* (159 U. S., 500), Mr. Justice Brown said:

Waste in its ordinary sense, being merely refuse thrown off in the process of converting raw wool into a manufacture of wool, can not be considered a manufacture simply because it acquires a new designation, and if it be artificially produced by the breaking up of the tops it is with even less reason entitled to be so considered. Unless natural waste can be treated as a manufacture, artificial waste should not.

Our conclusion is that this importation is more accurately described as jute unmanufactured than as waste not specially provided for. The decision of the Board of General Appraisers is *reversed*.

UNITED STATES *v.* VANDEGRIFT & Co. (No. 730).¹

PETITION FOR REHEARING AND TIME LIMITATIONS ON APPEALS.

Where a motion for a new trial has been entered within the time fixed by law, the limitation of 60 days within which it is permitted to take an appeal begins to run not from the date of the original decision, but from the date the motion for a new trial is disposed of.

United States Court of Customs Appeals, January 11, 1912.

[Motion denied.]

Wm. L. Wemple, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Walden & Webster for the motion.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is a motion to dismiss the appeal taken by the Government on the ground that the time for an appeal had elapsed when application for appeal was made to this court.

The original decision by the Board of General Appraisers was rendered June 16, 1911. A petition for rehearing was filed within the 30 days provided by law, and was denied by the board on July 6, 1911. The petition for review was filed in the office of the clerk of this court on August 29, 1911, which, though more than 60 days after the original decision, was less than 60 days after the decision denying the rehearing, and the question presented is whether the pendency of a motion for rehearing before the board arrests the running of the time fixed by statute for appeal to this court.

Subdivision 29 of section 28 of the tariff act of 1909 provides that—

If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision.

If this section stood alone, it would require no interpretation. But section 12 of the act relating to proceedings before the Board of General Appraisers provides:

The board of three general appraisers, or a majority of them, who decided the case, may, upon motion of either party made within thirty days next after their decision, grant a rehearing or retrial of said case when in their opinion the ends of justice require it.

¹ Reported in T. D. 32197 (22 Treas. Dec., 112).

A similar question arose in *Kingman v. Western Manufacturing Co.* (170 U. S., 675), in which case the authorities are reviewed at length. Circuit courts of appeal were empowered by section 6 of the act of March 3, 1891 (26 Stat. L., 826), to review final decisions of the district and circuit courts except in certain cases. By section 11 of that act it was provided:

No appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed.

The question presented in that case was whether, a motion for a new trial having been entered and later denied, the time for suing out a writ of error was limited to six months from the date of the original entry of the judgment sought to be reviewed or should date from the denial of the motion for a new trial. The court held that the trial court had not, while a motion was pending for a new trial, lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final for the purpose of taking out the writ, saying:

The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial. We do not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled.

It is equally true that in this case the entry of a motion for a rehearing and its consideration by the Board of General Appraisers must have of necessity left the case within their jurisdiction for determination. Subsection 29 of section 28 of the act of 1909 confers upon this court "exclusive appellate jurisdiction to review by appeal * * * final decisions by a Board of General Appraisers * * *" the provision corresponding to that above referred to conferring appellate jurisdiction upon circuit courts of appeal. The question in this case is, where rehearing is moved within the time fixed therefor by statute, whether the judgment or decision previously rendered is to be deemed final. The question in this case was whether, where a motion for a new trial had been entered within the time fixed by law, the previous decision was to be considered final. This question was answered in the negative. The present case is in all respects analogous.

It follows that the motion to dismiss should in this case be *denied*.

UNITED STATES *v.* DIDIER-MARCH Co. (No. 751).¹

EXHAUSTERS, COMPOSED WHOLLY OR IN PART OF METAL.

The exhausters are composed of stoneware and iron, stoneware being the component material of chief value. The iron couplings and screws that connect the stoneware parts are, however, substantial and material constituents of the machines, and this fact is sufficient to bring them within the terms of paragraph 193, tariff act of 1897. They were dutiable under that paragraph.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26371 (T. D. 31832).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

No appearance for appellee.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The Didier-March Co. imported into the country at the port of New York certain machines which are utilized in chemical works to remove or expel therefrom the fumes of nitrous acid. The machines are called exhausters and are composed of stoneware and metal, stoneware being the component material of chief value. The appraiser returned the goods as manufactures of metal and earthenware, with earthenware as the constituent of chief value. Accordingly the collector of customs laid a duty on the exhausters of 55 per cent ad valorem under the provisions of paragraph 96 of the tariff act of July 24, 1897, which paragraph is as follows:

96. All other china, porcelain, parian, bisque, earthen, stone, and crockery ware, and manufactures thereof, or of which the same is the component material of chief value, by whatever name known, not specially provided for in this act, if painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem; if not ornamented or decorated, fifty-five per centum ad valorem.

The importing company protested that the machines were not manufactures of earthenware, and as grounds of objection to the classification set up the claim that the exhausters were either salt-glazed common stoneware, dutiable at 25 per cent ad valorem under paragraph 94, or articles or wares composed wholly or in chief value of earthy or mineral substances dutiable at 35 per cent ad valorem under paragraph 97, or articles or wares not specially provided for composed wholly or in part of metal dutiable at 45 per cent under paragraph 193, or nonenumerated manufactured articles dutiable at 20 per cent ad valorem under section 6.

¹ Reported in T. D. 32198 (22 Treas. Dec., 114).

The paragraphs and section just referred to are as follows:

94. Common yellow, brown, or gray earthenware, plain, embossed, or salt-glazed common stoneware, and crucibles, all the foregoing not decorated in any manner, twenty-five per centum ad valorem; Rockingham earthenware not decorated, forty per centum ad valorem.

97. Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem.

193. Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

Sec. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

The Board of General Appraisers sustained the protest and directed that the importation be assessed for duty at 20 per cent ad valorem under the provisions of section 6. Within the time prescribed by law the Government filed a petition for a rehearing and asked for a reconsideration of the case on the ground that if the merchandise was dutiable under any of the claims of the protest it was dutiable under paragraph 193 as an article composed wholly or in part of metal and not specially provided for, and not under section 6. The petition for a rehearing was denied by the board, and in due time the Government, "being dissatisfied with the decision of the Board of United States General Appraisers * * * as to the construction of the law and the facts respecting the assessment of duty, * * * and being dissatisfied also with the procedure of said board, as herein-after specified," applied to this court for a review of "the questions involved in said decision."

Counsel for the Government contends, first, that as the exhausters are composed wholly or in part of metal they are provided for in paragraph 193, and therefore excluded from the operation of section 6; second, that the board erred in denying the petition for a rehearing, and that this court should so declare. Whether the board should have granted or denied a rehearing seems to us, for the purposes of this case, to be an academic rather than a practical question, and we must, therefore, decline to consider it. The Government claimed before the board and claims here that it was entitled to a rehearing on the ground that the board should have held the goods dutiable under paragraph 193. On this same ground it also asks for a reversal of the final decision after an appeal duly perfected and taken therefrom. On the record as presented this court may now finally fix the

rate of duty which the merchandise should carry, and once for all it may definitely determine whether the exhausters are or are not dutiable as articles or wares composed wholly or in part of metal. It would seem, therefore, to be a work of supererogation to consider a point the decision of which in appellant's favor could result in nothing more than a new hearing, a new judgment, a new appeal, and then a final decision by this court which could be just as well rendered on the present appeal.

At all events, having before us the question which is alike determinative of the correctness of the order denying a rehearing and of the final decision of the board, we think it well on a complete record to avoid circuitry of procedure and to make a decision which will end the litigation. We shall, therefore, deal solely with the appeal from the final decision of the board, and in particular with that part of it which assigns as error the failure of the board to hold the importation dutiable under paragraph 193 in accordance with the claims of the protest. Not being susceptible of decoration, the machines imported were not dutiable under the provisions of paragraph 96, as classified by the collector, and the board was correct in so deciding. *Fensterer & Ruhe v. United States* (1 Ct. Cust. Appls., 93; T. D. 31110). Neither were they dutiable as salt-glazed common stoneware under paragraph 94. That paragraph was intended to cover articles composed wholly of stoneware and not articles made up in part of stoneware and in part of other materials. *In re Behrend* (T. D. 25130). This reduces the competition to paragraph 193 and section 6, and as between the two we think the importation was properly dutiable under the former rather than under the latter provision. It appears from undisputed evidence that the exhausters are composed of stoneware and iron and that stoneware is the component material of chief value. The iron couplings and screws which connect or hold together the stoneware parts, however, are beyond debate substantial and material constituents of the machines, and that is enough, in our opinion, to bring them within the terms of paragraph 193, inasmuch as they are not otherwise specially provided for. *Seeberger v. Schlesinger* (152 U. S., 581, 587); *United States v. Downing* (1 Ct. Cust. Appls., 337; T. D. 31434).

If the enumeration in the paragraph just mentioned covers the articles imported, and we hold that it does, it follows that the goods are not classifiable or dutiable as "articles manufactured, in whole or in part, not provided for," and consequently that they can not be subjected to the provisions of section 6.

The decision of the Board of General Appraisers is therefore *reversed*, with directions that reliquidation be had under paragraph 193 in accordance with this opinion.

SHELDON & Co. v. UNITED STATES (No. 754).¹

AUTOMATIC LIGHTERS TO IGNITE ACETYLENE GAS.

From the evidence and upon examination of the article itself, it can not well be deemed a smoker's article. Its use appears to be to light acetylene lamps. It is dutiable as a manufacture of metal, paragraph 199, tariff act of 1909.—Distinguishing Abstract 13785 (T. D. 27785).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26400 (T. D. 31832).

[Reversed.]

Brown & Gerry for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. K. Payne*, Deputy Assistant Attorney General, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise imported in this case was assessed by the collector as smokers' articles, and on appeal to the Board of General Appraisers this assessment was affirmed. The importers claimed that the importation was dutiable at 45 per cent ad valorem as manufactures wholly or in part of metal, under paragraph 199 of the tariff act of 1909.

The article in question consists of a lighter, the component parts of which are a tube of metal 2 inches in length, at one end of which is inserted a wick extending through the tube and an additional 3½ inches hanging limp. The covering of the metal portion of the tube contains at one end of it a piece of metal which, in contact with the metal of the inner tube, ignites and causes the end of the wick incased in the tube to burn, not as a flame, but as a glow.

The evidence introduced by the importer was that of the treasurer and manager of the importing company, which is a motor-car equipment company. He testified that the article imported was used to ignite acetylene gas, and was advertised as the "Volcano Lamp-Wick Igniter," and sold for the purpose of igniting acetylene lamps. In answer to the question, "Are these ever used as cigar lighters?" he replied, "I don't think they can be used." In answer to the further question, "Never used as a smoker's article to light cigars or used in cigar stores?" Answer. "Well——"

Judge WAITE. Are they? If you don't know, say so.—A. I don't know; no.

The first question is whether upon this evidence and upon the appearance of the article itself this should be held to be dutiable as a smoker's article. We think not, and we base our conclusion in part upon the appearance of the article. It is not an article which one could well carry in the pocket. It is true it is possible, but a large portion of the wick is uncovered and extended. While it might have a proper place in the tool box of an automobile, it would cer-

¹ Reported in T. D. 32199 (22 Treas. Dec., 117).

tainly be an inconvenient, if not cumbersome, article to carry in the pocket. Indeed, the collector reports that the articles are not to be carried on the person.

In addition to this, the only testimony in the case showing the use of the article is that of the importers' witness, who states its use to be to ignite acetylene lamps. It could possibly be used by smokers to ignite cigars or pipes, and it was invoiced for some reason as a cigar lighter. Nevertheless, upon this record we think the evidence, based upon the character of the article as disclosed by inspection and by the testimony as to its use, clearly establishes that it is not in its chief use a smoker's article.

Reliance is placed by the Government upon the case Abstract 13785 (T. D. 27785). In that case the protest related to articles known as Instanto air pocket cigar lighters, and they were classified as smokers' articles. It is said in the opinion in this case that these articles are practically identical with those the subject of the board's decision in the case cited. This is evidently an error, for in the present case the collector reports that these articles are not designed to be carried in the pocket, a fact which would clearly distinguish that case from this, and this consideration also disposes of the contention of a legislative adoption of the rule in that case which would control the present.

The decision of the board should be *reversed* and the importation held dutiable as contended by importers.

UNITED STATES *v.* WYMAN & Co. (No. 755).¹

IRON CYLINDER CONTAINING LIQUID SULPHUROUS ACID.

The evidence shows beyond question that the tank and contents were ordered by the purchasing agent of the University of Kansas. Whether the tank, though a usual covering, would be free of duty as such under paragraph 151, tariff act of 1909, *query*; but paragraph 650 of the act applies. In the broader terms employed in paragraph 650, relative to apparatus for the use of institutions of learning, there appears to be a purpose to encourage institutions of the kind, and the paragraph must receive a reasonably liberal interpretation. The cylinder here was indispensable in keeping its contents in the safe and proper way to make these contents available for scientific instruction; it must be deemed scientific apparatus, and as such free of duty.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26392 (T. D. 31832).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (Wm. A. Robertson on the brief), for the United States.

Comstock & Washburn for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers reversing a protest reversing assessment of duty made by the sur-

¹ Reported in T. D. 32200 (22 Treas. Dec., 119).

veyor of customs at the port of St. Louis. The merchandise in question consists of an iron cylinder containing liquid sulphurous acid. The acid was passed free, but the cylinder was assessed for duty at the rate of 30 per cent ad valorem under paragraph 151 of the tariff law of 1909, which, so far as material, reads as follows:

151. * * * Cylindrical or tubular tanks or vessels, for holding gas, liquids, or other material, whether full or empty, thirty per centum ad valorem. * * *

The goods are claimed to be free of duty under paragraph 650, contained in the free list, and reading as follows:

650. Philosophical and scientific apparatus, utensils, instruments, and preparations, including bottles and boxes containing the same, specially imported in good faith for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, or seminary of learning in the United States, or any state or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe.

The evidence is undisputed, and shows that the tank and contents were ordered by the purchasing agent of the University of Kansas in 1909; that in the month of March the merchandise arrived at St. Louis and consisted of an iron cylinder containing liquid sulphurous acid; that this cylinder is made strong because it is under a tremendous pressure; that liquid sulphurous acid is a liquid only when subjected to tremendous pressure, otherwise it becomes a gas; that as late as February, 1911, the metal cylinder was still in the possession of the University of Kansas, containing a considerable portion of the liquid sulphurous acid originally supplied from abroad; that the amount of acid contained in the cylinder is sufficient to supply the needs of the department concerned for several years, in all probability; and that such acid is being used for scientific purposes in an educational institution, and the container is being used for scientific purposes, and for none other.

The Board of General Appraisers determined the goods to be duty free as usual covering of merchandise free of duty, finding that the cylinder in question is not an unusual covering. There can be no doubt about the correctness of this finding of fact, but were it essential to a decision of the case we would have difficulty in saying that, based upon that fact alone and in view of the provisions of paragraph 151 above cited, the cylinder in question is not subject to duty.

But it was strongly urged upon the argument that this metal container is in fact a part of a scientific apparatus as much as was the liquid sulphurous acid.

The tariff act of 1883 imposed a duty of 35 per cent upon philosophical apparatus and instruments. It contained no reference to the uses to which they were to be devoted. The test in such a case is to be made upon the appearance of the articles at importation.

In the case of *Robertson v. Oelschlaeger* (137 U. S., 436) the court found great difficulty in finding the dividing line between such articles as were to be denominated philosophical instruments and those which fell outside that description. The term "apparatus" was not much considered. The difficulty in applying the rule of the statute as it then existed will be apparent on a mere reading of the opinion in that case. It was said, in summing up:

In short, philosophical apparatus and instruments are such as are more commonly used for the purpose of making observations and discoveries in nature, and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity; whilst implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto.

When Congress came to provide for the free entry of apparatus and instruments for use of institutions of learning it employed much broader language, as will be seen by reference to section 650, above cited, which is in all substantial respects the same as the earlier provisions for free entry of such goods.

The question arose under the act of 1890, which placed on the free list—

Philosophical and scientific apparatus, instruments, and preparations * * * imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or for encouragement of the fine arts, and not intended for sale.

The question was presented in the case of *United States v. Presbyterian Hospital* (71 Fed. Rep., 866), as to what articles would come under the term "scientific instruments." It was said in that case that—

In cases arising under the statute, what is or what is not such an instrument is to be determined as a question of fact, according to the nature of the thing itself, and not necessarily according to the nature of the use for which it is primarily designed or in which it is principally employed.

In the later case of *In re Massachusetts General Hospital* (95 Fed. Rep., 973), in an opinion by Colt, Circuit Judge, this case was somewhat criticized. Referring to the rule above quoted from the opinion in the *Presbyterian Hospital* case, Judge Colt said:

This rule of interpretation is seemingly in conflict with *Robertson v. Oelschlaeger*, where the Supreme Court adopted the rule of "principal use" rather than "intrinsic character" with respect to philosophical instruments. Further, there are practical difficulties in the way of satisfactorily determining, by the testimony of experts, whether each imported article is or is not a scientific instrument, by reason of the intrinsic character of the thing itself. Moreover, this construction does not seem to effect the purpose of the statute, which is to aid the advancement of science and the fine arts by the admission free of duty of the means or instruments necessary to that end.

In our opinion sufficient stress was not laid upon the question of the intended use by the Circuit Court of Appeals in the *Presbyterian Hospital* case. It would seem that the provisions of the present and earlier cognate acts were designed to meet in some measure the diffi-

culties which surrounded the court in *Robertson v. Oelschlaeger*. The evident purpose of this section was to encourage institutions of learning, and there is no reason why the section should not be given a reasonably liberal interpretation. It broadened the scope from philosophical apparatus and instruments to include philosophical and scientific apparatus, utensils, instruments, and preparations imported in good faith for the use of such societies and not for sale. It is apparent that scientific apparatus, utensils, instruments, and preparations—that is, apparatus, utensils, instruments, and preparations used for instruction in the sciences and for scientific experiments—often are, indeed it might be said in most cases are, well adapted to use for other purposes. To place such a restricted meaning that they must be distinctively adapted only to the purpose of giving instruction in science or the arts would be to defeat in large measure the purpose of this provision.

The word “apparatus” is defined by the Century Dictionary as—

An equipment of things provided and adapted as a means to some end; especially, a collection, combination, or set of machinery, tools, instruments, utensils, appliances, or materials intended, adapted, and necessary for the accomplishment of some purpose, such as mechanical work, experimenting, etc.; as, chemical, philosophical, or surgical apparatus.

The definition of “apparatus” in Webster’s New International Dictionary is as follows:

2. Things provided as means to some end.

3. Hence: A collection or set of implements, or utensils, for a given work, experimental or operative; any complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery; mechanism.

These definitions are clearly broad enough to include any collection of things employed as a means to the end of scientific instruction, and given this construction, we think it should be held to include in this case not only the liquid sulphurous acid but the container as well. Indeed, if the liquid sulphurous acid is to be employed for a term of years, it is obvious that such a container is indispensable. It can not be released, as it would become gas. If released, it might cause a sudden and violent conversion of the liquid into gas and cause an explosion. It must therefore be used in the container in which it is imported or it must be transferred to another container of like capacity and strength. This we apprehend would be a very difficult process, and something perhaps not to be accomplished with the appliances at hand in such a place as the University of Kansas. A construction which admits this fluid content of the tank and excludes the tank itself from the provisions of this section is too narrow.

It results that the conclusion of the Board of General Appraisers that this article is entitled to free entry should be sustained.

Affirmed.

SPENCER IMPORTING & TRADING CO. v. UNITED STATES (No. 761).¹

1. "CLEAR."

That construction of the word "clear" as applied to shelled almonds will be avoided when to adopt such construction would bring a number of kindred statutory provisions into utter confusion. For a construction here, we have that enforced for many years by the Treasury Department and acquiesced in by the trade during that time; and

2. CLEAR-SHELLED ALMONDS WITH BROKEN SHELLS AND DUST.

Clear almonds, shelled, remain almonds, though they should contain a certain amount of broken kernels, dust, and shells, and they are not to be classified generally with "nuts of all kinds." They are dutiable as clear almonds, shelled, under paragraph 280, tariff act of 1909. Paragraph 283 of that act forbids any allowance for the weight of the dust and shells.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26800 (T. D. 31912).

[Affirmed.]

Hatch & Clute (Edward S. Hatch and Walter F. Welch of counsel) for appellant.

Wm. L. Wemple, Assistant Attorney General (Wm. A. Robertson on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

Under the tariff act of 1909 the appellants imported into this country a consignment of merchandise which was invoiced as 200 bags of sweet shelled I Bari almonds.

The collector classified the importation as clear almonds, shelled, within the provisions of paragraph 280 of that act, and assessed duty thereupon at the rate of 6 cents per pound.

The following is a copy of paragraph 280 just above cited, and also a copy of paragraph 283 hereinafter referred to:

280. Almonds, not shelled, four cents per pound; clear almonds, shelled, six cents per pound; apricot and peach kernels, four cents per pound.

283. Nuts of all kinds, shelled or unshelled, not specially provided for in this section, one cent per pound; but no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

The importers filed their protest to the classification of the merchandise under this paragraph and contended that the imported almonds were intermixed with such a quantity of broken kernels, dust, and shells as to forbid their classification as "clear almonds, shelled." The importers maintained that the importation did not therefore fall within the terms of paragraph 280, but should be classified under the provisions of paragraph 283 for "nuts of all kinds, shelled or unshelled, not specially provided for," and be assessed thereunder at the rate of 1 cent per pound. The

¹ Reported in T. D. 32201 (22 Treas. Dec., 122).

importers further contended that even if the almonds were held to be clear almonds, shelled, and therefore dutiable at 6 cents per pound, the duty should nevertheless be assessed only upon the net weight of the kernels after deducting from their gross weight the dust, shells, and other impurities intermixed with them at importation.

There were other alternative claims made by the importers in their protest, but those above set out are the ones upon which the case was heard. They may be repeated: First, that there was a certain quantity of broken kernels, dust, and shells intermixed with the imported almonds which prevented their classification as "clear almonds, shelled," and, second, that even if that classification were approved the duty provided for such clear almonds should be assessed only upon the net weight of the kernels free from impurities. This protest was heard by the Board of General Appraisers upon testimony which included also the record in the case of *Henry Heide v. The United States*, now pending in this court upon appeal. The briefs filed in the last-named case have likewise been considered as if filed in this case also. The board, upon consideration, overruled the protest of the importers, and this court is now asked to reverse that decision.

At the hearing before the board the importers tendered testimony in proof of the fact that the importation consisted, in round figures, of 64 per cent whole almond kernels, 26 per cent philopenas, 7 per cent pieces of kernels, and 3 per cent dust and shells. The philopenas are twin kernels, which are smaller than the single kernels generally found in the shells. The importer also tendered proof that the philopenas and broken pieces of kernels are marketable nuts and are used by confectioners in making almond paste, but that only the whole kernels are used in manufacturing the best grades of candy

The importers contended that this testimony was competent in support of their claim that the merchandise was not "clear almonds, shelled," and also that the testimony was both competent and necessary in making a proper assessment in event such assessment was to be computed upon the net weight of the almond kernels after deducting the weight of all impurities intermixed therewith.

The board rejected the tendered testimony upon the ground that such merchandise, namely, 64 per cent whole kernels, 26 per cent philopenas, 7 per cent pieces of kernels, and 3 per cent dust and shells would nevertheless be "clear almonds, shelled," within the purview of paragraph 280; and in this connection the board also held that under that classification the duty should be assessed upon the net weight of the importation without deduction for impurities, and

that therefore the tendered proof was relevant neither to the classification nor assessment of the merchandise.

The appellants excepted to these rulings of the board, and the issue thus effectually presented is whether or not it was error for the board to hold that the importation was "clear almonds, shelled," notwithstanding the fact that it was composed of the different elements above stated; and also whether or not it was error for the board to hold that under such a classification the merchandise should be assessed with duty at 6 cents per pound without deduction for any of the impurities contained therewith, according to the above statement.

It may be stated again that paragraph 280 provides a duty of 4 cents per pound upon almonds, not shelled, and 6 cents a pound upon clear almonds, shelled, and that paragraph 283 provides a duty of 1 cent a pound upon all nuts, shelled or unshelled, not specially provided for in the section. It is also provided in the latter paragraph that no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

The position of the appellants is that almonds, not shelled, are dutiable at 4 cents per pound, assessed upon both kernels and shells, and that shelled almonds are dutiable at 6 cents per pound if clear and at 1 cent per pound if not clear. Appellants contend that the present importation is not clear because of the presence of the philopenas, the broken pieces, and especially because of the dust and shells contained therewith. Therefore, according to appellants' claim as to classification, the importation is properly dutiable not at 6 cents per pound as clear almonds, shelled, but at 1 cent per pound as nuts, shelled, not specially provided for.

It may be stated as preliminary to an examination of this contention that there is nothing in the record tending to establish any technical trade or commercial meaning for the word "clear" as used in paragraph 280; and also that no effort was made to prove that the percentage of philopenas, broken kernels, or dust and shells contained in the importation is unusual or extraordinary for such merchandise. Nor does the record give any substantial reason for a belief that the expression "clear almonds" had reference to the product of any particular country, nor to shipments from any single port, nor to any especial variety or varieties of almonds.

In entering upon an inquiry into appellants' claim the mind is startled to perceive the anomalous result which would follow its adoption. According to that claim, if a package of shelled almonds be free from imperfect kernels and from impurities, such almonds are dutiable at 6 cents per pound, but if the package contains also

an admixture of imperfect kernels or of impurities, even though usual in such importations, the merchandise is no longer dutiable as almonds and does not fall within the almond paragraph at all, but in such case the almonds are to be classified simply as nuts not specially provided for, and the rate of duty becomes 1 cent per pound instead of the duty of 6 cents per pound first provided for.

The obvious unreasonableness of such a result constitutes of itself the most cogent argument against its adoption. The present case becomes a concrete illustration of this statement. The net weight of the present importation, without deduction for impurities, is 21,134 pounds. At 6 cents per pound the duty thereon would be \$1,268.04; at 1 cent per pound the duty would be \$211.34. There is nothing in the record which gives any weight or importance to the presence in the importation of philopenas and broken kernels; the dust and shells contained therein furnish the only real basis for appellants' claim. As seen above, then, according to appellants' claim, the presence of the 3 per cent of dust and shells in with the almonds would have the effect of reducing the duty assessed upon the importation more than \$1,000. The duty at 6 cents per pound upon the percentage of dust and shells contained in the importation, if the assessment be computed without deduction therefor, would be \$38.04; that is to say, the present importation contains impurities which if it be classified as "clear almonds, shelled," will cause the importer to pay \$38.04 duty upon the weight of the impurities, if that weight is not deducted in the assessment; and because of that fact the entire classification is changed so that the duty upon the importation is reduced in a sum exceeding \$1,000. It would certainly seem more reasonable to conclude that the weight of the impurities should be deducted from the assessable weight of the importation, and that the "clear" residue should thereupon be classified and assessed as if free from the impurities, in which event the presence of the impurities in the merchandise would neither increase the importers' payment nor diminish the Government's assessment.

In brief, however, according to appellants' contention, the present importation would be "clear almonds, shelled," and bear duty in the sum of \$1,268.04, except for the fact that there are impurities contained in the packages amounting to 3 per cent of their weight, and that because of that fact the importation should be classified as nuts and the duty assessed thereon at \$211.34. It must be apparent that this result would follow appellants' interpretation alike if the impurities remain in with the almonds after their first cleaning or are intentionally added to them for importation after they have once been perfectly cleaned. And it also follows that almonds, not shelled, would continue, if imported, to bear 4 cents per pound duty upon

both kernels and shells, whereas the shelled kernels alone if intermixed with 3 per cent of dust and shells would bear duty at the rate of 1 cent per pound only. The shells inclosing the unshelled almonds would in such an importation bear four times the duty imposed upon an equal weight of the shelled kernels, if only the kernels be not perfectly separated from all impurities. According to this theory, the application of foreign labor to the article before importation reduces instead of increases the duty which the tariff act imposes upon it.

The history and meaning of the word "clear" as used in paragraph 280 are obscure and doubtful, and in giving the word its interpretation the court should not adopt a meaning which makes the legislation upon this subject so inexplicable as is the result set out in the foregoing illustration. The court may not be authorized to give great weight to its own views concerning the justice or policy of any given legislation, and such considerations should in no case lead the court to depart from a clear expression of the legislative purpose. But where a given construction causes a number of kindred statutory provisions relating to the same subject to become mutually irregular, inconsistent, and even fantastic, it becomes the court's duty to avoid that construction, for these consequences sufficiently demonstrate that such construction does not correctly express the real legislative intention embodied in such provisions. The effect which would follow the adoption of appellants' claim therefore becomes important in discovering the true meaning in which the contested word is used in the enactment.

The phrase "clear almonds, shelled," first appeared in the tariff act of 1890. Before that time successive tariff laws provided simply for "almonds, shelled." The present phrase is found in the tariff acts of 1890, 1894, 1897, and 1909. As has been stated, the term was not a trade term, and there is nothing in the published literature of tariff legislation which shows its origin or intended application. But it is established by the testimony that under the tariff act of 1890, as under the preceding one, all shelled almonds alike were classified as such under the almond paragraph; and in practice the enactment of 1890 received no different interpretation because of the addition of the new word "clear." The testimony shows that this practice was continued generally and without protest until within the last several years, covering a period of about 17 years. During the 21 years which have elapsed since the first appearance of the word "clear" in the tariff act of 1890 the Government has always collected duty upon such importations as that at bar at the rate provided for "clear almonds, shelled," and, as above stated, this classification was not protested during the first 17 years of that period and during this

entire period almonds, not shelled, have paid duty at 4 cents per pound. These facts afford strong evidence that the contemporaneous trade to whom the provision was addressed and by whom it was best understood did not place upon it the interpretation now contended for by appellants. In many cases involving the interpretation of doubtful provisions such contemporary construction embodied in the action of the Government and the acquiescence of the trade becomes of itself a controlling authority. This applies with especial force to the case at bar. During all the years in question very large consignments of almonds have been continuously shipped to this country, which would have been controlled by the question herein made. And during all that time almonds, not shelled, have been largely imported, paying without protest a duty of 4 cents per pound, whereas according to appellants' present contention such almonds could have been shelled before importation and the duty upon them thereby reduced to 1 cent per pound, provided only the same were not entirely cleaned of all accompanying impurities.

Another consideration which deserves great weight is the fact that the several tariff laws which followed the act of 1890 continued the language of the almond paragraph unchanged except as to the rate of duty, notwithstanding the interpretation which was placed upon it by the Government as evidenced by the practice above stated. In the year 1908 a case was begun involving the question which is presented in this case and the board decided the issue against the protestants. That decision was unreversed at the time of the enactment of the present act, although the case had already been appealed. As a seeming answer to the importers' claim, however, there was incorporated in the act of 1909 an addition to paragraph 283, in the following words, "but no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled." The term "allowance" does not distinctly apply to the classification of the article, but appearing as it did during the pendency of the mentioned litigation, it seems to imply a legislative purpose that the presence of impurities with the almonds or other nuts shall not affect or control the duty which should be assessed upon them.

These considerations lead to the belief that the word "clear" as first used in the tariff act of 1890 was intended to emphasize the word "shelled," or was intended to apply to some mixture of shelled and unshelled almonds such as is altogether foreign to the facts in this case. As has just been stated, the case involving the same issue as this arising under the tariff act of 1897, was appealed from the board's decision to the circuit court just prior to the enactment of the present tariff act. That court at a time subsequent to the enactment of the present law held against the Government and reversed the decision of

the board. *Heide v. United States* (175 Fed. Rep., 316). The syllabus of the decision reads as follows:

1. CUSTOMS DUTIES (No. 30*)—CLASSIFICATION—CLEAR ALMONDS—"CLEAR."

In tariff act July 24, 1897 (c. 11, No. 1, Schedule G, par. 269, 30 Stat., 172; U. S. Comp. St., §1901, p. 1651), the provisions for "clear" shelled almonds refers to nuts that are practically and substantially free from shells, dust, and dirt, and after being divested of their outer covering are fairly free from that covering.

2. CUSTOMS DUTIES (No. 12*)—CONSTRUCTION—PROTECTIVE CHARACTER OF TARIFF ACT.

Since the tariff is enacted on protective lines, it is proper to take into consideration, in construing the law, the fact that certain grades of an imported commodity are the only ones that come into competition with domestic products.

It is stated by the appellant in the present case that the merchandise involved in the cited case was similar to the importation now at bar. It would follow that the circuit court in effect found that such almonds as these are not "substantially free from shells, dust, and dirt," nor "after being divested of their outer covering are fairly free from that covering." This court does not therefore reach the same conclusion as that reported in the foregoing decision.

For the reasons above suggested the court concludes that the importation was properly classified as "clear almonds, shelled," and was dutiable at 6 cents per pound under the provisions of paragraph 280; and that under the inhibition of paragraph 283 there should be no deduction from the weight of the importation because of the dust and shells in the assessment of duty.

The decision of the board is therefore *affirmed*.

SPENCER IMPORTING & TRADING CO. *v.* UNITED STATES (No. 722).¹

SHELLED ALMONDS.

Ruled by *Spencer Importing & Trading Co. v. United States*, *supra* p. 444 (T. D. 32201).

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 25946 (T. D. 31720).

[Affirmed.]

Hatch & Clute (Edward S. Hatch and Walter F. Welch of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Wm. A. Robertson on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

This case relates to the classification of shelled almonds, and presents the same issue as that litigated in a case of the same appellant upon the same subject which has just been decided by this court. In accordance with the conclusion reached in that case, the decision of the board in the present case is *affirmed*.

¹ Reported in T. D. 32202 (22 Treas. Dec., 129).

SEARS, ROEBUCK & Co. v. UNITED STATES (No. 771).¹

IMITATION BRONZE STATUARY MADE OF SPELTER.

Paragraphs 149 and 158, tariff act of 1909, have distinct fields of application. Paragraph 149, relative to cast hollow ware, has a long legislative and judicial history, here reviewed, and it appears such a ware must be made of cast iron. The importation is made of spelter. It is dutiable as assessed under paragraph 199, tariff act of 1909, as a manufacture of metal.

United States Court of Customs Appeals, January 11, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26563 (T. D. 31866).

[Affirmed.]

Lester C. Childs for appellants.

Wm. L. Wemple, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

Appeal from a decision of the Board of General Appraisers involving two classes of merchandise. The more serious controversy concerns the classification by the collector at the port of Chicago of certain imitation bronze statuary. They are made of spelter. The classification for dutiable purposes was there made under the provisions of paragraph 199 of the tariff act of 1909 as a manufacture of metal not specially provided for.

Contention is made by the importers, who come here as appellants from the decision of the Board of General Appraisers, that the merchandise is properly classifiable for dutiable purposes under the provisions of paragraph 149 of that act, which in language follows:

149. Cast hollow ware, coated, glazed, or tinned, one and one-half cents per pound.

The correctness of this assessment for dutiable purposes depends upon the construction to be given the term "cast hollow ware" and the scope allotted that phrase.

The proper interpretation thereof has, and we think correctly, been held by the Board of General Appraisers and the courts, under the various preceding tariff acts, to be controlled by the legislative history of the enactment. The first appearance of the term "hollow ware" was in the tariff act of March 2, 1861. In that act it read:

* * * On hollow-ware, glazed or tinned, two cents and a half per pound; on all other castings of iron not otherwise provided for, twenty-five per centum ad valorem.

Aside from the controlling force of the word "other" as used in the provision, it was written in a paragraph devoted solely to cast-iron productions.

Its next appearance was in the tariff act of July 14, 1862, wherein the language was:

On hollow-ware, glazed or tinned, one-half cent per pound.

¹ Reported in T. D. 32203 (22 Treas. Dec., 129).

In this act it appears as a part of section 3, which is devoted to other kinds of iron than cast iron; but the immediate provisions surrounding this are devoted to cast-iron articles.

Section 8 of the same act, however, provides:

On hollow-ware and vessels of cast iron, not otherwise provided for, one cent and one-fourth per pound.

In the act of June 30, 1864, it is provided:

On hollow-ware, glazed or tinned, three and one-half cents per pound.

In this act it appears in the immediate group of cast-iron articles and in an extended provision devoted wholly to iron and steel products, the sole exception being that of tin plates.

The act of March 3, 1883, provided:

Hollow-ware, coated, glazed, or tinned, three cents per pound.

In this act it appeared with many enumerated kinds of metal, iron and steel.

Under this act the scope of the provision was contested. It was sought by importers to have classified thereunder for dutiable purposes certain blue and white kitchen utensils, consisting of pots, kettles, saucepans, coffeepots, and similar ware made of sheet steel and glazed or enameled. The Government contended that the early history and constant use of this provision by the courts indicated a congressional intent to confine the scope of the words "hollow ware" as appearing in the act without qualification to hollow ware of cast iron. On appeal to the United States Circuit Court, Southern District of New York, the case was disposed of by direction of the court as follows:

Upon examination of the prior acts I am satisfied that Congress was of the understanding that "hollow ware" meant vessels of this general kind, which we have here, made of cast iron. For the reason, therefore, that there seems to have been a congressional meaning given to the words "hollow ware" and embodied in statutes before the passage of the act of 1883, I assume that Congress intended to use the words with the same meaning in the later act that it did in the prior act. Verdict directed in favor of the defendant. *Strausky v. Erhardt* (52 Fed. Rep., 808).

Pending the decision in this case, which was had in November, 1892, the tariff act of October 1, 1890, became a law. The provision reappears in that act as paragraph 163, undoubtedly prompted by the then existing legislation. The paragraph was made to read:

163. Cast hollow-ware, coated, glazed, or tinned, three cents per pound.

It appears in the identical language in the tariff act of August 27, 1894, as paragraph 136, and in the tariff act of July 24, 1897, as paragraph 150.

Further contention was made as it appeared in the tariff act of 1897 that it included teapots of antique appearance made of cast iron with wrought-iron handles and expensive bronze covers. The Board of General Appraisers held, no doubt for the reason that they were not

entirely or substantially of cast iron, that the merchandise was not dutiable under the provisions of paragraph 150 as cast hollow ware, but as manufactures of iron. The board reviewed in that case the history of this legislation and the customs interpretation of many years in the following succinct language:

The term "hollow ware" has been construed by the Treasury Department, this board, and the courts to mean cast-iron kitchen ware. In T. D. 3669, published July 24, 1878, the department held that certain frying pans were dutiable as vessels of cast iron, there being no provision at the time for hollow ware. In T. D. 8527, published November 8, 1887, the department held that the term "hollow ware," which appeared for the first time, included only cast-iron kitchen utensils. In G. A. 105 (T. D. 10414) this board held to the same effect, and the same ruling was laid down in *Strausky v. Erhardt* (52 Fed. Rep., 808). In the act of 1890 the word "cast" was added so as to make the provision read "cast hollow ware," showing congressional confirmation of the rulings referred to. *Fiske v. Henarie* (142 U. S., 459), *Sessions v. Romadka* (145 U. S., 29). With these rulings, extending over a period of thirty years, before us, we must hold that the articles in question are not included within the term "cast hollow ware" as used in the tariff. There are further circumstances which militate against these pots and cause them, according to our view, to fall without the meaning of the term. *Morimura Brothers, G. A. 6722* (T. D. 28795).

There can be no reasonable question, therefore, that at the time of the enactment of the tariff act of 1909 the words "cast hollow ware," as they appear in the preceding tariff acts, had been given such a construction by the courts and customs officials as to have a well-settled meaning. In the tariff act of 1909, however, we find two provisions upon the subject. The one is in the exact language of the three previous tariff acts. It is the provision under which claim is made by the importers here. It is numbered and reads as follows:

149. Cast hollow ware, coated, glazed, or tinned, one and one-half cents per pound.

The identical language in previous tariff acts having been given the well-settled construction that it did not extend to other than cast-iron ware, could not in any sense ordinarily be held in this tariff act to include such articles as are here imported admittedly made of spelter.

The other provision in the act of 1909, which is noted and to which the importers point as an argument, is as follows:

158. Table, kitchen, and hospital utensils, or other similar hollow ware, of iron or steel, enameled or glazed with vitreous glasses, but not ornamented or decorated with lithographic or other printing, forty per centum ad valorem.

Reading paragraph 158, we find in its terms no language which enlarges the scope of paragraph 149 *per se*. The two paragraphs were enacted at the same time. Any enlargement Congress may have intended in the scope of paragraph 149 must be found in the language of paragraph 158. If paragraph 158 is the foundation of appellants' rights, claim should have been made thereunder. The fact that Congress reenacted paragraph 149 in exact terms and provided a new paragraph (158) leads to the inference that the latter

was intended to include a subject other than that covered by the former. Any analysis of the separate provisions is here unnecessary. Suffice it to say that each has a broad and distinct field of application other than is contained in the other. The merchandise, however, is by the terms of paragraph 158 excluded therefrom, nor is claim made thereunder. Consequently we can discover no aid for appellants by reason of the enactment of paragraph 158, either as the foundation of a substantive right or as a legislative interpretation.

We are, therefore, of the opinion that upon this branch of the case the importers' contention is without substantial merit.

The second branch of the case concerns certain alleged Christmas-tree ornaments. The articles are in imitation of cherries, apples, and other fruits. They were assessed for dutiable purposes by the collector at the same port under the provisions of paragraph 438 of the tariff act of 1909 as artificial fruit. They are claimed to be dutiable as toys, and alleged to be used as Christmas-tree ornaments. No serious contention is made upon this branch of the case, and it is so clearly without merit that we give it no extended consideration.

No testimony was introduced concerning this merchandise or its uses, but it is manifest from the appearance thereof that it is equally suitable for millinery ornamentation as it is for the decoration of Christmas trees and can in no appreciable sense be considered to be intended as a plaything. *Illfelder v. United States* (1 Ct. Cust. Appls., 109; T. D. 31115); *Carson, Pirie, Scott & Co. v. United States* (2 Ct. Cust. Appls., 386; T. D. 32112).

Affirmed.

UNITED STATES *v.* WERTHEIMER & Co. (No. 599).¹

BOARD'S RULING NOT TO BE DISTURBED ON DEFECTIVE PROOF.

The evidence necessary to fix the proper classification of these gloves would include proof of a variety of facts as to manufacture and trade usage. The record here is scanty, too scanty of evidence to warrant the Board's finding being disturbed.—*United States v. Spielmann* (1 Ct. Cust. Appls., 279; T. D. 31320); *United States v. Perkins* (*ibid.*, 323; T. D. 31430); and *Carson v. United States* (2 Ct. Cust. Appls., —; T. D. 31656).

United States Court of Customs Appeals, January 12, 1912.

APPEAL from Board of United States General Appraisers, Abstract 24658 (T. D. 31236).

[*Affirmed.*]

Wm. L. Wemple, Assistant Attorney General (*Charles E. McNabb* on the brief), for the United States.

Curie, Smith & Maxwell (*W. Wickham Smith* and *Thomas M. Lane* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This appeal brings here for determination the question whether certain gloves imported at the port of New York, known in the trade

¹ Reported in T. D. 32204 (22 Treas. Dec., 133).

as Paris points, are "stitched or embroidered, with more than three single strands or cords," as that term is used in paragraph 459 of the tariff act of 1909. The phrase occurs in identical language as it did in paragraph 445 of the tariff act of 1897. The question is one of importance, affecting alike great industries in this country and merchandise imported in very large quantities, both to meet an extensive popular consumption of every-day wear. No subject received greater attention and was the issue of more extended litigation under the tariff act of 1897. Notwithstanding voluminous records and earnest efforts of the courts and Board of General Appraisers, a satisfactory solution of the question was, at the enactment of the tariff act of 1909, not reached. These matters are attested in the opinion of the board in this case.

This record comes here exceedingly scant of facts. There is a sample of the imported merchandise, and the return of the collector thereupon that it was stitched with more than three single strands or cords. At the hearing before the board but a single witness was produced, and he upon the part of the importers. The Government, appellant here, introduced no testimony whatsoever. The appeal comes here upon that record. This court in previous almost identical cases has refused to disturb the findings of the Board of General Appraisers.

In *United States v. Spielmann* (1 Ct. Cust. Appls., 279; T. D. 31320) the record consisted of the testimony of one witness and the exhibits, and this court refused to disturb the findings of the Board of General Appraisers thereupon.

In *United States v. Perkins* (1 Ct. Cust. Appls., 323; T. D. 31430), wherein the sole evidence before the board was the official samples, the gloves themselves as imported, this court again refused to enter upon a decision of this very important subject upon such an incomplete record, and affirmed the findings of the board.

In *Carson v. United States* (2 Ct. Cust. Appls., 105; T. D. 31656) the same rule was applied by this court.

The determination of this question as a finality involves the determination of questions of fact and law. The decided cases make apparent that entering into the determination of these questions of both fact and law there is pertinent much of trade understanding and conception, as well as elucidation as to the various methods of construction, not alone of the single class of gloves covered by any single importation, but involving various methods of construction adopted and in use by the trade. Any intelligible consideration of the subject, and any satisfactory conclusion the promulgation of which as a finality shall cover the vast importations of this class of merchandise, should of necessity have the benefit of this enlightenment.

Following numerous decisions of this court, therefore, we decline to reverse the decision of the Board of General Appraisers, and it is accordingly *affirmed*.

SHALLUS v. UNITED STATES (No. 603).¹

QUESTION OF FACT, WHEN TO BE DETERMINED BY BOARD.

The importation consisted of small pieces of gunny bagging packed in bales, and appropriate samples of the merchandise were exhibited. The proper classification of these goods could be ascertained without expert knowledge on an inspection of them; and the collector's classification should not be taken as conclusive. The goods were rags and as such entitled to free entry under the tariff act of 1897.—*Krusi v. United States* (1 Ct. Cust. Appls., 168; T. D. 31213); *Knauth v. United States* (*ibid.*, 178; T. D. 31216); *Train-Smith Co. v. United States* (140 Fed. Rep., 113).

United States Court of Customs Appeals, January 12, 1912.

APPEAL from Board of United States General Appraisers, Abstract 24670 (T. D. 31236).

[Reversed.]

Curie, Smith & Marwell (W. Wickham Smith and Thomas M. Lane of counsel) for appellant.

Wm. L. Wemple, Assistant Attorney General (Charles E. McNabb on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question in this case consists of pieces of old bagging assessed by the collector as waste not specially provided for at 10 per cent ad valorem under paragraph 463 of the tariff act of 1897. It is claimed by the protestants to be free of duty under paragraph 648 of the same act as rags.

The Board of General Appraisers overruled the protests of the importers, and appeal is taken to this court.

The board, in deciding the case, said:

The protests were submitted simply upon certain official samples which were forwarded to the board. Many of these samples are so small as to indicate simply the nature of the material and throw little or no light upon the classification of the goods.

There is a presumption in favor of the correctness of the classification as reported by the appraiser and made by the collector. No evidence is given by either of the importers that they ever made a personal examination of a single bale among the hundreds involved in these protests, and no testimony was offered in support of any one of the contentions made, outside of the samples themselves. The practice of the board has been not to reverse the classification of the collector in cases of this kind unless the importer supports his contentions by proper testimony. The board is not called on to exercise expert testimony in any case of this character.

This holding presents the principal question in the case, which is, May the importer rest his case upon the official samples, and does it become the duty of the board to determine, as a question of fact, whether protestants' claim is supported by the evidence afforded by these samples?

We think this question is concluded by the previous decisions of this court. It was said by the court in *Krusi v. United States* (1 Ct. Cust. Appls., 168; T. D. 31213):

When facts which determine the classification of imported merchandise are ascertainable and ascertained from an inspection of the goods themselves by the Board of General Appraisers, availing itself of the common knowledge and experience of which judicial notice may be taken, it can not be said that there is no evidence to support a finding of such facts.

¹ Reported in T. D. 32305 (22 Treas. Dec., 134).

And in *Knauth v. United States* (1 Ct. Cust. Appls., 178; T. D. 31216) it was held that the official sample of goods made the subject of controversy having been selected by the customs officer charged with the duty of making a selection, it will be presumed that the sample was chosen as fairly representative of the merchandise. See also *United States v. Seattle Brewing & Malting Co.* (1 Ct. Cust. Appls., 362; T. D. 31454).

We think, under these rulings, it became the duty of the board not to exercise expert knowledge—for expert knowledge is not necessary to determine whether this importation consisted of rags, as evidenced by the samples—but to determine as a question of fact, from an inspection of the samples, what the goods of which the samples were assumed to be fairly representative consisted of. We have examined the samples with care, and we are of the opinion that within the holding in the case of *Train-Smith Company v. United States* (140 Fed. Rep., 113), which appears now to be accepted as laying down the correct rule, these importations consisted of rags. In this case as in that the merchandise does not appear to be of such a character as to be capable of use for patching purposes. The appraiser returned that the goods consisted of small pieces of gunny bagging packed in bales, and this is supported by an inspection of the samples. We think enough appeared *prima facie* to show that these importations should have been classified as rags. As there was no opposing testimony, the protest should have been sustained.

The decision of the board will be *reversed* and a reliquidation ordered.

HABICHT, BRAUN & Co. *et al.* v. UNITED STATES (No. 679).¹

WALNUTS OF ALL KINDS, SHELLED.

The attempts to establish a commercial designation must be deemed to have failed, though a proper view of the language in paragraph 281, tariff act of 1909, would exclude in its construction any evidence of trade designation; the words there are essentially descriptive, not denominative. Walnut meat, broken in parts less than halves, are dutiable as "walnuts of all kinds," "shelled," under paragraph 281.

United States Court of Customs Appeals, January 12, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7229 (T. D. 31651).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. A. Robertson* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers affirming a decision of the collector of customs at the port

¹ Reported in T. D. 32206 (22 Treas. Dec., 136).

of New York, classifying certain pieces of walnut meat, broken in parts less than halves, as "walnuts, * * * shelled" under the provisions of paragraph 281 of the tariff act of August 5, 1909. The paragraph reads:

281. Filberts and walnuts of all kinds, not shelled, three cents per pound; shelled, five cents per pound.

Counsel for the importers, appellants here, maintain that the merchandise is a nonenumerated unmanufactured or a nonenumerated manufactured article, and, if not either such, properly dutiable under the provisions of paragraph 283 of the act, which, in so far as pertinent, is as follows:

283. Nuts of all kinds, shelled or unshelled, not specially provided for in this section, one cent per pound. * * *

At the hearing it was sought by the importers to establish a commercial designation controlling the subject matter. Their brief was directed to the point that this merchandise was known in the trade and commerce as "walnut pieces." They sought to differentiate between these and the shelled halves of walnuts, claiming only the latter to be within the statutory designation "walnuts, * * * shelled," and that this merchandise was beyond that category. The Board of General Appraisers deemed the evidence insufficient, and on a careful reading of the same we think they did not err. Three witnesses testified. One of them related experiences scarcely sufficient to qualify him as a witness upon commercial designation, while the testimony of the others was by no means of that quality essential to establish such a uniform general common understanding of the trade term throughout the United States as would warrant its adoption as denominative of the meaning of a term of a provision of a tariff law.

Error is claimed by counsel for the importers in that the board excluded in part testimony offered to establish in part this alleged commercial understanding. In our view of the case there was no error which invaded any substantial right of the importers. Indeed, it would seem to us that the board would have been entirely warranted in excluding all evidence going to the point of commercial designation, upon the ground that the statute itself bears inherent evidence that it was not used by Congress in a commercial sense. The Supreme Court in *Newman v. Arthur* (109 U. S., 132, 137), speaking upon this subject, stated:

It is sought to support this argument by invoking the rule of construing the statute applied in *Arthur v. Morrison* (96 U. S., 108) and the numerous cases there cited, that where words are used in an act imposing duties upon imports which have acquired, in commercial use, a meaning different from their ordinary meaning, the latter may be controlled by the former if such be the apparent intent of the statute; but the rule does not apply in the present instance because the language used is unequivocal.

There is no reference in the statute, either expressly or by implication, to any commercial usage, and there is no language in it which requires for its interpretation the aid of any extrinsic circumstances.

The provision, paragraph 281, seems to us essentially descriptive and not denominative. By its scope it expressly endeavors to cover all classes of filberts and all classes of walnuts, reaching out without limitation from both sides of the line of distinction set forth in the paragraph itself. It does not use a term "walnuts, shelled," or a term "walnuts, not shelled." It uses the phrase "walnuts of all kinds," first "not shelled" and second "shelled." In the first place, the classes of walnuts are modified by the phrase "of all kinds," indicating the comprehensive idea of Congress, and the limiting words "not shelled" and "shelled" are sufficiently broad to cover every description, kind, and class of walnut meats, without any limitation as to whether they are broken in one piece or two pieces or a greater number of pieces.

We think the internal evidences of the paragraph itself would have justified the board in excluding all testimony going toward the point of commercial designation upon the ground, as set forth in the case of *Newman v. Arthur*, *supra*, that not only was there lack of intent upon the part of Congress to use the words in a commercial sense, but its adjective character and descriptive force are peculiarly of that quality as to plainly indicate a broad general description upon the part of Congress of all classes of this merchandise whether in the shell or out, regardless of condition.

Affirmed.

AMERICAN EXPRESS CO. *et al* v. UNITED STATES (No. 736).¹

PAPERS WITH COATED SURFACE OR SURFACES, NOT SPECIALLY PROVIDED FOR.

By the deliberate change made and appearing in paragraph 411, tariff act of 1909, making it read "paper with coated surface or surfaces, not specially provided for," it can not be doubted a change of meaning was intended; and papers like the importation that in fact have a coated surface or surfaces are dutiable under that paragraph.—*Kupfer v. United States* (2 Ct. Cust. Appls., —; T. D. 32041) distinguished.

United States Court of Customs Appeals, January 12, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26052 (T. D. 31757).

[*Affirmed.*]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Martin T. Baldwin* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The importation here is a species of paper used in the printing of decalcomanias. It is invoiced as "single transfer paper" or as

¹ Reported in T. D. 32307 (22 Treas. Dec., 138)

"duplex lithotransfer paper." The paper termed "single" is a one-thickness paper, the surface of which is coated with a preparation of gum, and the "duplex" is made of two layers united, the lower being plain and the upper coated with a gummy substance. This paper when lithographically printed is used to transfer lithographic impressions to pottery ware, etc. It was assessed for duty under the provision in paragraph 411 of the act of 1909 for "paper with coated surface or surfaces, not specially provided for." The importers before the board and here rely upon the claim that said paper is dutiable under paragraph 415 of the same act as paper not specially provided for.

No evidence was taken below, and the Board of General Appraisers, relying upon the official samples and the papers transmitted to it with the protest, sustained the assessment.

The sole question is whether Congress, by changing the term "surface-coated papers, not specially provided for in this act," in paragraph 398 of the act of 1897 to that employed in paragraph 411 of the act of 1909, which is "papers with coated surface or surfaces, not specially provided for in this section," made such a change in the law as to include the merchandise at bar, which it is agreed was not dutiable under said paragraph 398. In other words, the question is whether the expression "papers with coated surface or surfaces" has the same meaning as "surface-coated papers."

As further describing the precise character and construction of the merchandise here involved it is agreed that the paper is identical with that before this court in *United States v. Borgfeldt* (2 Ct. Cust. Appls., 197; T. D. 31945), except that the paper there had upon it decalcomanias, while in the case at bar they are wanting.

In the *Borgfeldt* case it was found that both the "simplex" and "duplex" forms of the paper were surfaced with a solution of starch and this in turn was coated with dextrin, or gum, which was designed to receive the color design or figure constituting the decalcomanias. This dextrin or gum coating appeared to be for the double purpose of preventing the colors from running into the starch and paper and for fastening the design to the pottery. The office of the starch is to prevent the gum from sticking to the paper and to permit the withdrawal of the same from the paper when moistened, thus leaving the decalcomania attached by the gum to the article to be decorated.

The substance of the importers' contention here is that the term "surface-coated papers" from legislative and judicial history is established to mean a coating permanent in character accomplished by certain processes peculiar to the surface-coating paper art; that the term "surface-coated papers" and "papers with a coated surface or surfaces" are synonymous, and therefore that the assessment is oneous.

Admittedly, if the claimed interpretation be the true one the conclusion is justified. The Government, on the other hand, insists that these two terms are not synonymous, that in the absence of proof of any definite and uniform trade meaning for words used in a statute the ordinary meaning thereof must prevail, and that giving such ordinary meaning to the quoted term in the later act it clearly includes the merchandise at bar.

It is unnecessary to enter upon an exhaustive review of the numerous cases in which the meaning of the term "surface-coated papers" has been considered under various tariff acts. Congress in "Notes on Tariff Revision" had its attention called to many of these and it must be presumed to have had cognizance of the fact that this phraseology in the act of 1897 and in preceding acts had been productive of much litigation. It is no stretch of imagination to believe that it designed by its change in the phraseology of the paragraphs under consideration to declare, as indeed the ordinary meaning of the words used would seem to indicate, that all papers which in fact possess a coated surface or surfaces should be, unless otherwise provided for, assessed under paragraph 411. This would result in an abandonment of the various refinements of reasoning and consideration of trade practices and usages which appear to be involved in some of the cases referred to and leave it a simple question of fact to be determined in each case upon the evidence whether the paper has or has not a coated surface or surfaces, regardless of the character thereof, and the manner in which or the purposes for which such coated surface or surfaces are imparted to the paper.

It has not been suggested either that any absurd or inconsistent results may flow from such an interpretation of the statute or that injustice or inequality may result therefrom.

It will be presumed that Congress was fully cognizant of the fact that as respecting some classes of importations at least the meaning of the term "surface-coated papers" had been settled by adjudication and had it desired or designed that the same interpretation and classification of merchandise thereunder should continue, there is no reason suggested why it should have changed the language of the act in this respect.

We hold that by this deliberate change in the expression a change of meaning was intended, and we think there is no escape from the conclusion that the words should be held to mean just what they import, namely, that papers like the importation here, which in fact have a coated surface or surfaces, are, unless otherwise specially provided for, dutiable under paragraph 411.

The case of *Kupfer v. United States* (2 Ct. Cust. Appls., 302; T. D. 32041) is much relied upon by the importers as ruling the issue here, but it clearly appears from an examination thereof that the

question there involved was whether plain paper coated with metal, either by applying a metal wash thereto or by pasting a metal leaf thereon, was paper covered with metal or its solutions within the meaning of paragraph 411. It was urged by the importer that it was not such, because the paper had not been surface-coated before the above-described metal coating had been applied. This contention was not upheld. The remarks of the court by Montgomery, Chief Judge, regarding the paragraphs here under consideration do not relate to and therefore do not affect the issue here.

The judgment of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* DANKER & MARSTON (No. 753).¹

WANT OF SPECIFICATION IN THE PROTEST.

Whether the present proceeding be considered as an appeal solely from the final decision of the board or as an appeal from the order denying a rehearing, together with an appeal from the final decision, there is but one question really presented, namely, Could the board properly direct the admission of the merchandise free of duty under a paragraph of the law not made the basis of any claim by the importer? It was error so to direct. The burden was on the importer to show that his goods were properly dutiable according to the paragraph or paragraphs he had protested were applicable. He failed to do this.

United States Court of Customs Appeals, January 12, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7255 (T. D. 31798).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Frank L. Laurence* on the brief), for the United States.

Searle & Pillsbury for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

Some time in the latter part of 1905 the firm of Danker & Marston imported at Boston, Mass., several consignments of a product known as gum tragacanth. The importation was classified by the collector of customs as a nonenumerated manufactured article and accordingly it was assessed for duty at 20 per cent ad valorem under the provisions of section 6 of the tariff act of July 24, 1897, which section reads as follows:

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

The importers objected to the classification of the collector and the assessment of duty based thereon and claimed that the merchandise was either dutiable under the provisions of said section 6

¹ Reported in T. D. 32208 (22 Treas. Dec., 141).

as a nonenumerated unmanufactured article at 10 per cent ad valorem or free of duty under paragraph 548 of section 2, which reads as follows:

FREE LIST.—SEC. 2. That on and after the passage of this act, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty:

* * * * *

548. Drugs, such as barks, beans, berries, balsams, buds, bulbs, and bulbous roots, excrescences, fruits, flowers, dried fibers, and dried insects, grains, gums, and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, and stems, spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process, and not specially provided for in this act.

The Board of General Appraisers found that the goods were entitled to free entry under the provisions of paragraph 482, which is a free-list paragraph of the tariff act of 1897, and reads as follows:

482. Articles in a crude state used in dyeing or tanning not specially provided for in this act.

On this finding and apparently on the erroneous assumption that the importers had protested under paragraph 482 the board sustained the protests and directed the collector to reliquidate the entries on the basis that the goods were entitled to admission free of duty. Subsequent to this decision the Government filed with the board a petition for a rehearing, alleging that its application in that behalf should be granted and the protests overruled on the ground that the importers had not claimed free entry under paragraph 482, and on the further ground that the board in a like case (T. D. 26732) had overruled a similar protest. The petition for a rehearing was denied by the board, and within 60 days after the decision determining the classification of the goods and the rate of duty thereon the Government, being dissatisfied therewith and "also with the procedure of said board," applied to this court for a review of the questions involved "in said decision and for such relief in the premises as the law provides or as to the court shall seem just." As "errors of law and fact involved in said decision," the Government assigned, among others, that the board erred "in holding that the said merchandise was entitled to free entry under paragraph 482 of the act of 1897;" and "in not granting the petition of the Assistant Attorney General for a rehearing in these cases on the ground that the protests failed to enumerate the claim for free entry under paragraph 482 of the act of 1897." * * *

On the hearing of the appeal appellees presented neither brief nor argument.

From the petition for a review it is evident that an appeal was taken to this court from the decision of the board "as to the construction of the law and the facts respecting the assessment of duty on certain imported merchandise"; that is to say, from the final decision of the board. Whether the Government intended, however, to take an appeal in the same petition from the order denying a rehearing or to do anything more than to assign such denial as error on the appeal from the final decision is not so clear. But whatever was the intention of the Government in that regard, the fact remains that whether the present proceeding be considered as an appeal solely from the final decision or as an appeal from both the final decision and the order denying a rehearing, there is but one issue raised by it and that is: Was the board justified in directing that the merchandise be admitted free of duty under a paragraph not claimed or set up by the importers in their protests? As that question is directly involved in an adequate appeal from the final decision, we deem it unnecessary to determine whether an appeal lies from an order of the Board of General Appraisers denying a rehearing, and of course it is equally unnecessary to decide whether such an appeal, if legally taken, might not be waived by a concurrent or subsequent appeal vesting this court with the jurisdiction to finally fix the classification and rate of duty. Neither is it necessary, in our opinion, to a proper consideration of the case to say whether or not an order denying a rehearing may be assigned as error on appeal from the final decision. We shall, therefore, pass over that part of the appellant's brief which argues for a review of the board's denial of a rehearing and come immediately to the consideration of that which is at once the ground relied upon for a rehearing and the error assigned for a reversal of the final decision from which an effective appeal has been taken. Was the board warranted in admitting the goods free of duty under protests which failed to point out or suggest in any way the proper provision which determined their status under the tariff act in effect at the time of their importation? We think not. The merchandise was classified by the collector as a nonenumerated manufactured article and assessed for duty at 20 per cent ad valorem under section 6 of the tariff act of 1897. The importer claimed that it was either free of duty as one of the drugs mentioned in paragraph 548 of that act, or dutiable at 10 per cent ad valorem as a nonenumerated unmanufactured article under section 6 thereof. The issue thus raised by the classification of the collector and the protest of the importer put the burden on the latter to show not only that the classification to which he objected was erroneous, but that the classification which he claimed in his protest was correct. *Davies v. Arthur* (96 U. S., 148, 150, 151); *Hermann v. Robertson* (152 U. S., 521, 525, 526); *Strakosh United States*, (1 Ct. Cust. Appls., 360; T. D. 31453); *Bliven v.*

United States (1 Ct. Cust. Appls., 205; T. D. 31239); Benjamin Iron & Steel Co. v. United States (2 Ct. Cust. Appls., 159; T. D. 31677).

The board found on the evidence adduced before it that gum tragasol was an article in a crude state used in dyeing and tanning, not specially provided for, and therefore within the terms of paragraph 482. As the correctness of that finding is not disputed by the parties to this appeal and is, in effect, admitted by their stipulation, it is evident that in this case, at least, the goods imported can not be considered either as drugs within the meaning of paragraph 548 or as nonenumerated unmanufactured articles within the intention of section 6. From this it follows that the classification claimed by the importers was incorrect and that their protests should have been overruled.

The decision of the Board of General Appraisers is, therefore, *reversed*.

DE VRIES, Judge, did not sit in this case.

CASSETT v. UNITED STATES (No. 227). CASSETT & Co. v. UNITED STATES (No. 228).¹

ISAROL, AN AMMONIUM SULPHOICHTHYOLATE—ICHTHYOL.

The importation is a compound obtained by treating crude ichthyol oil with sulphuric acid and neutralizing this with ammonium carbonate. Paragraph 626, tariff act of 1897, is confined to oils, and, so far as it relates to ichthyol, may properly be read, "oils, namely, ichthyol," etc. The particular name by which an ichthyol preparation is known can not determine the question of fact as to whether it is dutiable under that paragraph as ichthyol oil; whether, in truth, it is such a preparation as retains sufficient characteristics of the ichthyol oil to be within the intent and meaning of Congress in enacting paragraph 626. Is the commodity ichthyol oil, must be the true inquiry, for the paragraph covers all ichthyol oils. The importation here is a product of ichthyol, called isarol. Equally with Merck's ichthyol, it is an ammonium sulphoichthyolate, and as such is an oil within the meaning of paragraph 626. It was entitled to free entry as "oil, ichthyol."—United States v. Merck (T. D. 29600); G. A. 5703 (T. D. 25376).

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7005 (T. D. 30526).

[Reversed.]

Walter Evans Hampton for appellants.

D. Frank Lloyd, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers affirming the action of the collector of customs at Philadelphia in assessing at 25 per cent ad valorem, under paragraph 68 of the act

¹ Reported in T. D. 32225 (22 Treas. Dec., 164).

of 1897, as a medicinal preparation the article known as isarol, which is claimed to be ichthyol ammonium, or ammonium ichthyol sulphonate, or ammonium sulphoichthyolate, against the protest of the importer, claiming free entry under paragraph 626 of said act. Paragraph 626 reads as follows:

Oils: Almond, amber, crude and rectified ambergris, anise or aniseed, aniline, aspic or spike lavender, bergamot, cajeput, caraway, cassia, cinnamon, cedrat, chamomile, citronella or lemon grass, civet, cocoanut, fennel, ichthyol, jasmine or jasmine, juglandium, juniper, lavender, lemon, limes, mace, neroli or orange flower, enfleurage grease, nut oil or oil of nuts not otherwise specially provided for in this act, orange oil, olive oil for manufacturing or mechanical purposes fit only for such use and valued at not more than sixty cents per gallon, ottar of roses, palm, rosemary or anthos, sesame or sesamum seed or bean, thyme, origanum red or white, valerian; and also spermaceti, whale, and other fish oils of American fisheries, and all fish and other products, of such fisheries; petroleum, crude or refined: *Provided*, That if there be imported into the United States crude petroleum or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country.

The evidence discloses that the commodity the subject of this controversy is known as ichthyol ammonium, sometimes called ammonium ichthyol sulphonate, or ammonium sulphoichthyolate, these terms being used interchangeably. The article is a compound obtained by the treatment of crude ichthyol oil and treated by sulphonic acid and neutralized by ammonium carbonate.

In the Century Dictionary published in 1890, prior to the enactment of this statute, ichthyol is defined as—

A sirupy liquid with a bituminous odor and taste, prepared by the dry distillation of a bituminous mineral containing fossil fishes. It has been used externally in the treatment of various skin diseases.

This original substance is described in the National Standard Dispensatory under the name of "ichthyolum," or "ichthyol," used interchangeably, as follows:

The name ichthyol, derived from the Greek, is commercially applied to the ammonium salt of ichthyolsulphonic acid. Other compounds are designated by prefixing the name of the respective base, as sodiumichthyol, calciumichthyol, etc.

The source of all ichthyol compounds is a crude oil—ichthyol oil—resulting from the destructive distillation of a bituminous rock filled with fossil fish and found in large quantities near Seefeld, in the Tyrol Mountains of Europe, at an elevation of 3,000 to 4,000 feet. This oil is a brownish-yellow transparent liquid of 0.865 specific gravity, boiling between 100° and 225° C. (212° and 437° F.), and possessing a peculiar penetrating, somewhat aromatic odor.

And in another part, in describing the article commercially known as ichthyol, it is said:

It is a clear, reddish-brown, sirupy liquid with a bituminous odor and taste, soluble in water, glycerin, and in a mixture of equal volumes of ether and alcohol. Alcohol or ether alone takes up only a part of it; so also petroleum ether.

In the British Pharmaceutical Codex it is said:

Ammonium ichtho sulphonate was introduced and first tested pharmaceutically and in a clinical practice under the trade name of "ichthyol." It is also known under the trade names of "ichtamon," "ichden," "ichthyodine," "ichthosan," "isarol," "piscarol," "thiolin," etc.

It will be noted that paragraph 626 is a paragraph confined to oils. The word "oils" is followed by a colon and by the specific names of the various oils referred to, including ichthyol. It should be read as though it had been printed "oils, namely, ichthyol," etc. Whether it be held therefore that the substance which had been evolved as a commercial product and given the name of ichthyol so far retains the character of oil as to bring it within this paragraph or not, it can not be brought therein by segregating the word ichthyol from the body of the paragraph and treating that single word as designating the proprietary article called ichthyol for free entry to the exclusion of other like substances or the crude oil itself. The paragraph equally covers all ichthyol oils, and unless the product hereinafter referred to as Merck's ichthyol is an oil within the meaning of this paragraph, it is no more admissible under the free list than is the importation under consideration in the present case.

The first case in which this question came before the board was *In re Merck*, G. A. 5703 (T. D. 25376). In that case the importation under consideration was what is known as Merck's ichthyol, which is an ammonium ichthyol sulphonate. It was contended by the Government in that case that this paragraph relates to ichthyol oil and not to ammonium ichthyol sulphonate, which is a chemical salt. The paragraph was held to cover the importation in question, the board saying:

After an exhaustive search for information, it appears, and we find, that the only article which has been known in trade and commerce in the United States as ichthyol is the ammonium salt of the acid above described, which is the article under consideration, and the same is a chemical compound and a nonalcoholic medicinal preparation. This is probably due to the fact that of all the various salts with which the word "ichthyol" is associated it has been in the greatest demand and most extensively used in the practice of medicine. The foreign manufacturers and the domestic importer have applied the name of ichthyol thereto as a trade-mark or name, and it has become so known commonly and commercially.

This case was decided in 1904, and has since been followed to the extent of admitting Merck's ichthyol under paragraph 626.

Just what were the sources of information upon which this finding of the board in Merck's case was based is not apparent. But as the authorities on pharmaceutical chemistry treat the ammonium sulpho-compound of crude ichthyol as ichthyol, it is not believed that this escaped the notice of the board. If it was the purpose of the board to make the dutiable character of this material depend upon whether an importer had adopted a trade-mark giving the substance that

name, we can not follow the board in that holding, and some color is given to the claim that such was the purpose of the board by the case of *In re Sykes* (T. D. 27323), as well as in the holding in the present case.

In another respect the court is unable to accept the reasoning of the board in *Merck's case* (T. D. 25376). The contention of the Government in that case, that the article the free entry of which was authorized by paragraph 626 was ichthyol oil, was met by the following language:

In reply, it appears that the oil used in the manufacture of this article is a rock oil or petroleum which carries in chemical combination a high percentage of sulphur and occurs in strata of the earth containing fossilized remains of fish and marine animals. Free entry is provided in paragraph 626 for petroleum, crude or refined, unless produced in a country which imposes a duty on petroleum exported from the United States, in which case it is made subject to a duty equal to the duty imposed by such country. It is therefore clear that the provision for ichthyol was not intended to cover the crude petroleum used in the manufacture of the article under consideration.

We think this conclusion by no means follows. Ichthyol oil, as before indicated, was very clearly provided for. This is a more specific provision than petroleum, crude or refined. While ichthyol oil may be a kind of petroleum, all petroleum is not ichthyol oil. But if we assume that it is, the fact that crude petroleum is made subject to duty when imported from those countries which impose a duty upon petroleum or its products exported from the United States, this fact would not operate to take petroleum or any species of petroleum out of the paragraph bodily and deny it free entry in all cases. Treating *Merck's case*, however, as deciding the question which was really presented to the board, we find that it determines that sulphoichthyol ammonium, which was imported under the name of ichthyol, was entitled to free entry.

The Circuit Court, in *Merck & Co. v. United States* (177 Fed. Rep., 482), in an opinion by Judge Martin, said:

If one compound of ichthyol is free, why not the others? The only answer is that ichthyol ammonium, although a compound and a medicinal preparation, is by usage in the trade designated as ichthyol, and therefore ichthyol ammonium should be admitted free, while the other compounds of ichthyol must pay a duty.

The finding that ammonium ichthyol sulphonate had become known to the trade and commerce as ichthyol prior to the enactment of the act of 1897 having been made and followed all these years, and the Government in the present case not appearing to contest the correctness of that decision, we have only to deal with the question of whether the present article should be distinguished from *Merck's ichthyol*.

The decision of the board rested upon the view that the importers had failed to show that isarol is commercially known as ichthyol and that the two articles are not chemically identical, although it was said

that a superficial examination and comparison of their physical qualities showed that they resemble each other. This conclusion again rests upon the view, apparently, that Merck & Co. have by the adoption of the name "ichthylol" been able to exclude all other products having the same qualities and the same derivation from free entry while themselves enjoying that privilege.

This is a mistaken view of the use of the word "ichthylol" in the paragraph in question. If Merck's ichthylol was an ichthylol oil, it was properly admitted, otherwise not. A treatment of the oil which still retains some of its characteristics and fits it for use may not have been sufficient to exclude it from free entry. But, nevertheless, the authority to admit it must be found in the fact that ichthylol oil is provided for in the free list.

The name by which the particular preparation is known can not determine the question of fact as to whether it is an ichthylol oil or such a preparation of ichthylol as yet retains sufficient of the characteristics of ichthylol oil to be within the intent and meaning of Congress in enacting this paragraph. Resolved by this test, the questions in this case are somewhat simplified. There is no chemical identity between these two articles for the reason that both contain a complicated ingredient whose precise chemical constituents do not seem to have been determined, and there can be no chemical identity between such different compounds except by chance.

Benjamin L. Murray, a chemist in the employ of Merck & Co., who was made a witness for the Government, testified:

Q. Now, referring to the analysis that you made of the ichthylol regarding the percentage of sulphur, taking the ichthylol samples as a class, did you find any variation in the percentage of sulphur?—A. Yes; there is always a variation, because the stuff is a mixture.

Q. In some cases you found a greater quantity of sulphur and in some cases less? Is that right?—A. Yes.

Q. And you found the same thing as to the isarol? Is that it?—A. Well, I found a variation which is quite a good deal wider variation in this isarol.

And in another place he testified as follows:

Q. Now, are ichthylol and isarol chemical entities?—A. No; neither one of them is.

Q. Do you know of any chemical formula for ichthylol?—A. I have seen chemical formulas for it, but there is not any real chemical formula for it.

Q. Why not?—A. Because it is a mixture of several ingredients. Chemical formulas are applicable only to single ingredients.

Q. And the same is true of isarol, is it?—A. I have never seen a formula for isarol, but there could not possibly be one on the same grounds.

The testimony shows that the preparation involved in this case is an ammonium sulphoichthyolate, just as is Merck's ichthylol. There was an attempt to show a difference between the appearance of the two articles as to color, and there doubtless is a slight difference, which is accounted for by Prof. Sadtler, whose testimony was introduced by the importers, as probably arising by a slight difference

in the degree of temperature at which the original crude oil had been obtained or slightly different conditions under which the sulphonation had been effected. The same witness testified that when he analyzed Merck's ichthyol he found it to correspond in the main with the chemical qualities of ichthyol ammonium or ammonium sulphoichthyolate, and that he found isarol to correspond to that character equally.

But as to the question of color, it is significant that while the testimony offered on behalf of the Government in this case tends to show that Merck's ichthyol is a red-brown solution with green florescence, and that isarol is a brown solution, the Oxford Dictionary defines ichthyol as "a brownish-yellow sirupy liquid of disagreeable odor obtained by the dry distillation of bituminous rocks containing remains of fossil fishes." It is altogether reasonable to assume that this difference in color produced in the ammonium sulphoichthyolate by different methods should vary slightly. The same thing may be true of the slightly differing quantities of sulphur found in the two preparations or in other characteristics, as it would be extremely unlikely that an ammonium ichthyol sulphonate derived from the original distillation would, by two different processes, or perhaps by two different chemists, prove exactly identical. Indeed this is not found to be the case of analyses of different samples of Merck's ichthyol.

It is enough to say that we are fully satisfied that this product of isarol is equally with Merck's ichthyol an ammonium sulphoichthyolate, and if ichthyol is entitled to free entry as an ammonium sulphoichthyolate, isarol, being substantially identical in all essentials, is entitled to the same consideration.

It remains to consider whether ammonium ichthyol sulphonate is an oil within the meaning of this paragraph. We think it should be held to be entitled to free entry on the principle enunciated in *United States v. Merck* (T. D. 29600). In that case the Court of Appeals of the Second Circuit had under consideration a provision for "salts of cinchona bark," and the question presented was whether euquinine should be admitted free. Euquinine is a preparation more or less directly from cinchona bark for use in medicine. Its medicinal qualities are substantially the same as those of sulphate of quinia and other preparations from the same source. The board had held that it "is not a salt of cinchona bark, but it is an ester and a medicinal preparation, in the preparation of which alcohol is used," and sustained the collector. The court said:

There is a great deal of chemical testimony in the case which we do not find it necessary to discuss. The word "ester" is a term of the German chemists and applies to what the English chemist calls compound ethers. The weight of the expert evidence is to the effect that an ester is not in the strict use of chemical nomenclature a salt, although some of the witnesses say it is "an ethereal salt." But that is not determina-

tive of the question. Congress did not use the language of chemical science in paragraph 647. It provides for "salts of cinchona bark," and all the experts agree that there is no such thing. What it meant, undoubtedly, was that quinine (sulphate of quinia) and the other derivatives from cinchona bark which preserved the controlling or essential medicinal element of the bark should be admitted free of duty. Since the group thus designated is a more specific one than that covered by paragraph 67, "medicinal preparations containing alcohol," etc., we concur with the judge who heard the cause at circuit.

See also *Schoellkopf v. United States* (71 Fed. Rep., 694).

Ammonium ichthyol sulphonate is an oily substance. The evidence as to the importation in the present case given by the witnesses for the Government shows that oily globules are present in both Merck's ichthyol and that of the present importer. While it is not the native oil, it is still an oily substance, and as this substance is in Merck's case, *supra*, held to be the only product of ichthyol of commerce, and as it appears to be conceded that Merck's ichthyol is within the terms of this paragraph, isarol should be held to be also.

The decision of the board is *reversed*.

AHLBRECHT & SON v. UNITED STATES (No. 643). MENZEL & Co. v. UNITED STATES (No. 644).¹

1. STATUTORY CONSTRUCTION.

By a familiar rule, a statute that has been reenacted takes the established construction of that statute, but it is always open to the court to determine whether any change that may appear in new phraseology employed was meant to compel a different construction, the prime purpose always being to get at the real intent of the legislature.

2. HERRINGS IN TINS, SMOKED OR PICKLED.

In paragraph 272, tariff act of 1909, Congress has correlated herrings of all kinds and has included there herrings, pickled or salted, smoked or kippered, with the knowledge, it is to be presumed, that kippered herring can only be imported as fish in tins and has so made of the terms employed a designation more specific than "all other fish (except shellfish) in tin packages," paragraph 270. The importations are dutiable under paragraph 272.—*United States v. Rosenstein* (T. D. 31358) distinguished.

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board United States General Appraisers, G. A. 7198 (T. D. 31474).

[Reversed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Chas. D. Lawrence on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These two appeals were heard together, and involve the dutiable classification of herring. The Ahlbrecht appeal covers pickled herring packed in tins, and the Menzel appeal, smoked herring packed

¹ Reported in T. D. 32226 (22 Treas. Dec., 170).

in tins. Duty was assessed thereon at 30 per cent under paragraph 270, tariff act of 1909, as "all other fish (except shellfish) in tin packages." Paragraph 270 reads:

270. Fish (except shellfish) by whatever name known, packed in oil, in bottles, jars, kegs, tin boxes, or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, keg, box, or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, keg, box, or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, keg, box, or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, keg, box, or can; all other fish (except shellfish) in tin packages, thirty per centum ad valorem; fish in packages, containing less than one-half barrel, and not specially provided for in this section, thirty per centum ad valorem; caviar, and other preserved roe of fish, thirty per centum ad valorem.

The appellants claim the merchandise dutiable under the *eo nomine* designation of paragraph 272, reading:

272. Herrings, pickled or salted, smoked or kippered, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound; eels and smelts, fresh or frozen, three-fourths of one cent per pound.

The board sustained the action of the collector, General Appraisers Chamberlain and Fischer concurring and General Appraiser McClelland dissenting from the conclusion of the majority.

A brief history of the tariff acts in relation to fish in tins as contrasted with *eo nomine* provision for herrings may aid in solving the question involved. The tariff act of 1890 contained three provisions which were deemed relevant, reading as follows:

295. Fish in cans or packages made of tin or other material, except anchovies and sardines and fish packed in any other manner, not specially enumerated or provided for in this act, thirty per centum ad valorem.

296. Cans or packages, made of tin or other metal, containing shellfish admitted free of duty, not exceeding one quart in contents, shall be subject to a duty of eight cents per dozen cans or packages; and when exceeding one quart, shall be subject to an additional duty of four cents per dozen for each additional half quart or fractional part thereof: *Provided*, That until June thirtieth, eighteen hundred and ninety-one, such cans or packages shall be admitted as now provided by law.

294. Herrings, pickled or salted, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound.

The question arose in the case of *In re Johnson* (56 Fed. Rep., 822) as to whether various kinds of herring packed in hermetically sealed tin cans and known as "Digby chicks," "preserved bloaters," "divided herring," "kippered herring," "fresh herring," "deviled herring," and "herring in tomato sauce," were dutiable under paragraph 294 as herrings, pickled or salted, or under paragraph 295 as fish in cans. The question was decided by Lacombe, Circuit Judge, in language which we quote so far as pertinent to the present issue:

Neither construction of this paragraph 295 is altogether satisfactory. It is extremely secure, but upon considering the various interpretations of it which have been presented I adhere to the view that it is to be construed as follows: There should be

laid a duty of 30 per cent ad valorem upon (a) fish in cans or packages made of tin or other material (except anchovies and sardines), and (b) fish packed in any manner other than such as has been heretofore specially enumerated or provided; the apparent intent being not so much to lay the duty upon fish, but to lay the duty upon the tin can that brought the fish in, and I am persuaded to take that view of the phraseology of the immediately succeeding section, 296.

Paragraph 296 was not reenacted in the revision of 1894, and has not since appeared in the tariff acts. Notwithstanding this omission, and the omission apparently not having been called to the attention of the court, the court, in *Kauffman v. United States* (99 Fed. Rep., 430), held that fish in tins pickled in vinegar and known as "Bismarck herrings" were dutiable under the provision for "all other fish in tin packages" under paragraph 258 of the act of 1897. The court said:

The Board of General Appraisers cited the decision of Judge Lacombe *In re Johnson* (56 Fed. Rep., 822), and affirmed the decision of the collector. I think Congress intended, by the provision for a duty of 30 per cent on "all other fish, in tin packages," to provide that any fish imported in such packages should pay the duty of 30 per cent, irrespective of the kind of fish therein. As Judge Lacombe says in the *Johnson* case, "the apparent intention is not so much to lay the duty on fish, but to lay the duty upon the tin cans that brought the fish in."

The case was followed again by the Circuit Court of Appeals for the Seventh Circuit in *Benson v. United States* (159 Fed. Rep., 118), in which case the reasoning is not extended beyond saying that—

Ad valorem duty imposed by paragraph 258 for "other fish" extends only to goods "in tin packages," while the fish subject to the specific duties of paragraphs 260 and 261 are not so limited, implying other forms of packages. Thus the legislative intent appears to require the ad valorem and higher duty when imported in tin, as well defined in *Kauffman Bros. v. United States* (99 Fed. Rep., 430), approving the cognate ruling *In re Johnson* (56 Fed. Rep., 822.)

It will be observed that the two last-cited cases reach the conclusion largely upon the authority of *In re Johnson*, and that the provision of the statute upon which *In re Johnson* in part at least rested had been eliminated from the tariff act under discussion in these cases.

The contention is made, however, that these cases should be deemed controlling for the reason that Congress in enacting the tariff law of 1909 should be deemed to have enacted it with the judicial construction which had been placed upon the previous statute. The rule that the presumption that a reenactment of a statute does not ordinarily change its meaning or construction, and that when a statute is reenacted in the same or substantially the same terms as one which has received a previous judicial construction, such reenactment will be ordinarily deemed to have read into its provisions the construction so previously given to it, is well understood. See 2 Lewis's *Sutherland Statutory Construction* (par. 403), and *Endlich Statutory Construction* (par. 368).

This rule, however, leaves it always open for the court to determine whether any change in the phraseology employed was intended

to do away with the construction which had been given to the prior statute, the prime purpose always being to get at the real intent of the legislature.

This question has not, as it is now presented, been heretofore considered by this court. It is true that in the case of *United States v. Rosenstein* (T. D. 31358) this section of the act was considered. In that case the question was whether kippered herring should be assessed for duty under paragraph 272 or under paragraph 270. The question for consideration by this court, however, was a question of fact. The board had previously ruled that the only kippered herring known to commerce prior to the tariff act of 1909 was kippered herring in tins, and that by the introduction of the words "kippered herring" in section 272 it must be inferred that the word "kippered" as applied to herrings was more specific than the provision for "fish in tins" contained in section 270. The question presented in the *Rosenstein* case was whether the Government in a new case had shown that as a matter of fact the board was in error in the previous case, known as *Vandegrift's case* (T. D. 30528), in finding that kippered herrings other than those in tins were unknown to commerce at the time of the enactment of the tariff law of 1909. This court determined the case as thus presented, and found the fact to be that kippered herring other than in tins was not known to commerce. This was as far as it was necessary to go in the case, and in fact determined the only question presented in the case.

But the question is now presented and is suggested in the opinion of General Appraiser McClelland as to whether the fact of the introduction of the word "kippered" does not have a broader significance and does not indicate a purpose on the part of Congress to subject all the herrings in the same classification to the rate of duty prescribed in paragraph 272. With possibly a less degree of force, but nevertheless with very great force, it can be said that when Congress, dealing with herrings, pickled, salted, smoked, or kippered, with a knowledge that they were introducing into that paragraph and in correlation with the other classes described a kind of herring which could be introduced into the commerce of the country only in tin cans, provided a rate of duty for all alike, it must be inferred that this was intended as a more specific designation and description of the article than is found in the general provision "all other fish (except shellfish) in tin packages."

A careful consideration of the case has led us to the view that such is the proper construction of this paragraph, and that, as between the two contrasting provisions, it appearing that Congress is dealing with a kind of fish which at least in part, namely, when kippered, would come technically within the first description, yet as correlated herrings of all kinds and included in the one paragraph

herrings, pickled or salted, smoked or kippered, with the presumed knowledge on the part of Congress that kippered herring can be imported only as fish in tins, the intent is to be gathered to make herrings, pickled, salted, smoked, or kippered a more specific designation than that for "all other fish (except shellfish) in tin packages."

It follows that the cases cited under the previous tariff acts are not controlling, and that the protests in these cases should be sustained and the decision of the board *reversed*.

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JACKSON Co. *et al.* *v.* UNITED STATES (No. 693).¹

CAST-IRON LININGS FOR MANTELS AND FIREPLACES.

The several pieces of the importation, constituting the fireplace and mantel sets, have been so designed, formed, shaped, and fitted together that they have lost their identity as castings and have become parts of a consistent whole; they have passed from the category of materials into one of articles that, through manufacturing processes, have had their ultimate use determined. The fact that the castings are not assembled does not deprive them of their character as entireties. The articles were dutiable as assessed under paragraph 199, tariff act of 1909.

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7218 (T. D. 31566).

[Affirmed.]

Churchill & Marlow (Wm. A. Hines of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (Wm. K. Payne, Deputy Assistant Attorney General, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This appeal raises the question of the classification for customs purposes of certain cast-iron linings for mantels and fireplaces. The merchandise was returned by the appraiser as a manufacture of metal, and accordingly it was assessed for duty by the collector of customs at the port of New York at 45 per cent ad valorem under the provisions of paragraph 199 of the tariff act of August 5, 1909, which paragraph reads as follows:

199. Articles or wares not specially provided for in this section, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers protested that the goods were cast-iron plates, or cast-iron plates advanced in condition, or castings of malleable iron not specially provided for, and that therefore they were dutiable under one or other of the following paragraphs:

147. Cast-iron andirons, plates, stove plates, sadirons, tailor's irons, hatter's irons, and castings and vessels wholly of cast iron, eight-tenths of one cent per pound. All castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition by processes or operations subsequent to the casting

¹ Reported in T. D. 32227 (22 Treas. Dec., 174).

process but not made up into articles, shall pay two-tenths of one cent per pound more than the rate imposed upon the castings of iron and cast-iron plates hereinbefore provided for.

148. Castings of malleable iron not specially provided for in this section, seven-tenths of one cent per pound.

The Board of General Appraisers overruled the protests and the importers appealed.

The castings are 54 in number and represent the linings of nine fireplaces and their corresponding mantels. For each fireplace there is a back piece and two side pieces, and for each mantel there is a frieze piece and two jamb pieces. The side pieces of the fireplace are fitted to the back piece and the back piece and sides are equipped with lug bolts and corresponding straps, so that they may be firmly bound together as a single unit. The three pieces together form a fireplace lining, and all three pieces carry the same scheme of decoration—that is to say, cast figures and scroll work of the same type and character. A frieze and two jamb castings make up a lining set for a mantel, and as these pieces come ready to be put in place without cutting, chiseling, drilling, or painting we assume that they are fit to be used for no other purpose than as parts of the set.

Counsel for appellants admit that if these castings had been imported under the tariff act of July 24, 1897, they could not have been classified as castings; and that if so imported, they would have been dutiable under paragraph 193 of that act at 45 per cent ad valorem. They call attention, however, to the fact that paragraph 147 of the tariff act of 1909 covers a wider field than the corresponding provision (par. 148) of the tariff act of 1897, and that under the later legislative dispensation goods such as those imported should be classified as "castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition by processes or operations subsequent to the casting process, but not made up into articles." The vice of this contention lies in the fact that it is based on the assumption that the several castings must be considered not as parts of a whole, but as distinct entities, with an individuality of their own. That assumption we do not think is warranted by the evidence in the case. The merchandise itself bears witness that manufacturing processes and a definite purpose cooperated from beginning to completion to produce something more than chiseled, drilled, machined, or otherwise advanced castings and that the several pieces constituting the fireplace and mantel sets have been so designed, shaped, formed, and fitted together that they have lost their identity as castings and have become the parts of a consistent whole. In a word, they have been advanced beyond the point of castings out of which something may be made and have become definite articles with a definite name and with a specific use, which unfits them for any other commercial purpose than that of mantel and fireplace linings.

Indeed it would seem that they are unfit for any use except as linings for the particular mantels and fireplaces for which they were especially designed or as linings for mantels and fireplaces of like form and dimensions. Cast-metal products with the characteristics of those imported have passed out of the category of materials, and have reached the stage not only of manufactured articles, but of manufactured articles the final and ultimate use of which has been fixed and determined by manufacturing processes. *Knauth v. United States* (1 Ct. Cust. Appls., 422; T. D. 31499); *Wanner v. United States* (2 Ct. Cust. Appls., 68; T. D. 31628); *United States v. Dudley* (174 U. S., 670, 673).

The fact that these linings as imported are not assembled into the form of their ultimate use does not deprive them of their character of entireties, and neither does it require that the parts into which the entirety has been temporarily resolved should be considered for tariff purposes as separate entities. "Knocked down" or assembled, the castings, which were imported together, constituted mantel and fireplace linings, and for nothing else were they commercially fit or available. They were therefore, in our opinion, dutiable as entireties under the well-settled rule laid down by the courts. *United States v. Auto Import Co.* (168 Fed. Rep., 242); *Park & Tilford v. United States* (1 Ct. Cust. Appls., 34; T. D. 31006); *Knauth v. United States* (1 Ct. Cust. Appls., 422; T. D. 31499); *Isaacs v. Jonas* (148 U. S., 648, 653, 654); *United States v. Isaacs* (148 U. S., 654, 656).

The decision of the Board of General Appraisers is *affirmed*.

GARDNER & Co. v. UNITED STATES (No. 721).¹

TABLE COVERS OF FLAX, WITH SCALLOPED EDGES.

"Scalloped by hand or machinery for any purpose," as these words appear in paragraph 349, tariff act of 1909, must be taken to provide that if an article in other respects within the provisions of the paragraph has been in fact scalloped by hand or machinery it is dutiable thereunder regardless of the purpose for which the scalloping was done, and it is not necessary that the article should be otherwise ornamented or embroidered.

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7237 (T. D. 31707).

[Affirmed.]

Brown & Gerry for appellants.

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

The merchandise involved here is table covers composed of flax with the edges scalloped. It was assessed for duty by the collector

¹ Reported in T. D. 32226 (22 Treas. Dec., 176).

under paragraph 349 of the tariff act of 1909, the only part of which that is material here is as follows:

349. * * * Wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, or tamboured, appliquéed, or scalloped, by hand or machinery, for any purpose, or from which threads have been drawn, cut, or punched to produce openwork, ornamented or embroidered in any manner herein described, in any part thereof, however small. * * *

No issue of fact is raised, and if the merchandise is not dutiable under the paragraph, as above quoted, the importers' contention that it is dutiable under paragraph 357 of the same act should be sustained.

The Government's claim is that being scalloped, it is clearly dutiable under paragraph 349, as the scalloped article is explicitly therein provided for.

The importers' claim is that not only must the merchandise be scalloped in order to be dutiable under the paragraph, but in addition it must be ornamented or embroidered in some part thereof in one of the methods mentioned in the quoted part of the paragraph.

It appears that the words "scalloped by hand or machinery for any purpose" were first inserted in the tariff act of 1909, and it is of course beyond question that thereby Congress intended to bring articles scalloped by hand or machinery, whatever may have been the purpose of such scalloping, within the duty rate of the paragraph. The importers do not deny this, but claim that in order to be so embraced it must also appear that the article, in addition to having been scalloped by hand or machinery, must be ornamented or embroidered in one of the other manners described in the quoted part of the paragraph, and that failing in this, it is excluded therefrom.

Prior to the enactment of this paragraph there had been considerable litigation upon the subject of scalloped articles, the results of which we think are well stated by the Board of General Appraisers in its opinion in this case, which we quote and which sufficiently for the purposes of this decision refers to prior litigation:

The classification of scalloped articles under the act of 1897 as determined by the board and the courts is clearly set forth in G. A. 6966 (T. D. 30271). Under the rule laid down in that case scalloped articles were dutiable as embroidered articles under paragraph 339, tariff act of 1897, when the needlework thereon was ornamental, and articles having a plain scalloped edge were not dutiable under that paragraph.

The litigation on this subject was explicitly called to the attention of Congress in "Notes on Tariff Revision," page 440, and Congress thereupon saw fit to place within the paragraph the words "scalloped by hand or machinery for any purpose," and we think it thereby intended to provide that if an article in other respects within the provisions of paragraph 349 were in fact scalloped by hand or machinery regardless of the purpose for which the scalloping was done it should be dutiable thereunder, and that it is not necessary that the article should in addition be otherwise ornamented or embroidered.

The judgment of the Board of General Appraisers is *affirmed*.

KNAUTH, NACHOD & KUHNE v. UNITED STATES (No. 744).¹

WOVEN COTTON CLOTH WITH AN ARTIFICIAL SILK FLOCK.

The merchandise is a cotton cloth coated and artificial silk constitutes its value in chief. In determining its proper classification the rule applies that an *eo nomine* provision is more specific than words of general description. The duty is not imposed upon the artificial silk as such, but upon a designated article, "cotton cloth, coated." Cotton cloth, coated, is dutiable under paragraph 321, tariff act of 1909.—United States v. Zinn & Co. (2 Ct. Cust. Appls., 419; T. D. 32171).

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26218 (T. D. 31788).

[Reversed.]

Brown & Gerry for appellants.

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The importations involved in this case are governed by the tariff act of 1909. They consist of woven cotton cloth coated with an artificial silk flock, the artificial silk constituting the chief value of the article. They were classified by the collector as "articles or fabrics composed in chief value of artificial silk," within the terms of paragraph 405, and were assessed with duty at the rate provided by that paragraph.

The importers filed their protest to this ruling and contended that the goods should be classified as "cotton cloth, coated," within the provisions of paragraph 321 of the act.

The protest was duly heard by the Board of General Appraisers and was overruled. The appellants now pray for a reversal of that decision.

The brief description of the importations above set out is sufficient to indicate that each of the two competing designations aptly covers them. The goods are "cotton cloth, coated," and they are likewise "articles or fabrics composed in chief value of artificial silk." Such a use of the word "fabric" seems at first view to be somewhat doubtful; it is sustained, however, by the authority of *Converse v. United States* (113 Fed. Rep., 817). The question therefore arises, Which of the two designations is the more specific, or is otherwise the more apt and exact, designation of the articles in question?

The question thus presented seems to find its appropriate answer in the well-known rule that "an *eo nomine* provision is more specific than a provision couched in words of general description."

The duty now in question is not laid upon the artificial silk as such, but rather upon certain articles as entireties of which the silk is only

¹ Reported in T. D. 32229 (22 Treas. Dec., 178).

one component part. One of the competing paragraphs names the dutiable article directly as cotton cloth, coated; the other paragraph describes it as any article or fabric composed in chief value of artificial silk. The latter paragraph does not specifically name the articles or fabrics which are thus to be composed in chief value of artificial silk, nor does it define their form or use; nor does it specify what other material or materials shall or may enter into their composition. This latter description is general, and includes any and all articles or fabrics in chief value of artificial silk, at least all such as are *ejusdem generis* with those named in the paragraph in question. It seems, therefore, that the cotton paragraph is that which applies to the goods by force of a direct and exact name for them, and should for that reason control their classification.

In the case at bar the record contains an illustration of the natural and reasonable character of this rule and the propriety of its application to this case. Upon the filing of the importers' protest the appraiser examined the importation and made his return to the collector. In this return he reported the goods to be "cotton cloth coated with artificial silk, the artificial silk being of chief value." That is to say, when the appraiser came to name the article in question for assessment as an entirety he adopted the substantive "cotton cloth" as such name, following it with appropriate terms of description. And this is obviously the apt and exact designation of the article in fact, and by that name it is specifically included within the cotton paragraph.

The principles which are thus suggested are near akin to those underlying the case of the *United States v. Zinn & Co.* (2 Ct. Cust. Appls., 419; T. D. 32171), which has been decided by this court during the present term. That case involved silk-lined baskets, silk being the original component material of chief value. The articles were held to be baskets of wood, rather than manufactures in chief value of silk, upon the ground that the former designation, being *eo nomine* in character, should prevail over the latter, which is in the nature of a general description only.

In the brief of appellee it is conceded that an *eo nomine* provision should ordinarily prevail over one containing a mere general description, but it is furthermore contended that "words of general description may be so chosen as to exhibit unmistakably an intention to embrace within their scope a particular group of articles which might also fall within the terms of some class designation that likewise appears in the tariff law." The case of *Oppenheimer v. United States* (71 Fed. Rep., 869) is cited as an authority much in point. In that case hoods made of cotton chenille were held dutiable under a provision for "all goods manufactured of cotton chenille," rather than as "clothing, ready made, composed of cotton, not specially provided for." However, the following extract from the opinion rendered in

the cited case detracts materially from its force as an authority for appellee's contention:

It will be observed that the chenille provision does not contain the qualifying words "not otherwise provided for," and thus is in its phraseology absolute and exclusive. On the other hand, the wearing apparel provision is qualified by the words "not specially provided for in this act," thus evincing the intention of Congress to except some articles of cotton wearing apparel from the general enumeration.

In addition to the foregoing considerations the cotton paragraph seems to be the more exactly applicable to these goods because it contains a special reference to the coating process whereby the artificial silk flock is imposed upon the cotton cloth. A striking characteristic of the merchandise, upon inspection, is the manner in which the flock is attached by a binding to the surface of the cotton fabric. This is a coating only, for the artificial silk does not enter into the real web of the goods, but may easily be scraped from the surface of the article without otherwise affecting its structure. The article is therefore very distinctively a cotton cloth, coated, and that description seems especially apt and definite in its application to the same. It narrows and makes specific the manner in which the artificial silk is applied or added to the article in question.

Upon the considerations above suggested the court reaches the conclusion that the goods in question should be classified in accordance with the contention of the importers, and the decision of the board is therefore *reversed*.

AUFFMORDT & Co. v. UNITED STATES (No. 750).¹

PROVISO TO PARAGRAPH 380, TARIFF ACT OF 1909.

The importation was of woollen dress goods with cotton warp weighing over 4 ounces per square yard. Under the proviso to paragraph 380, tariff act of 1909, the collector, after fixing the duty at 44 cents per pound and 55 per cent ad valorem, deducted 5 per cent from this total sum and assessed the remainder. The importer protested the proviso should be read as reducing the ad valorem rate to 50 from 55 per cent. This contention was properly overruled by the board. The proviso to the paragraph should be subjected to the same construction as if the 5 per cent had been expressed by the equivalent term, "one-twentieth."

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7260 (T. D. 31803).

[Affirmed.]

Walden & Webster (Henry J. Webster of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

This case calls for a construction of those provisions of the several paragraphs of the tariff act of 1909 quoted below:

378. On cloths * * * made wholly or in part of wool, not specially provided for in this section * * * valued at over seventy cents per pound, the duty per

¹ Reported in T. D. 32230 (22 Treas. Dec., 180).

pound shall be four times the duty imposed by this section on one pound of unwashed wool of the first class and fifty-five per centum ad valorem.

Paragraph 369 provides that—

The duty upon all wools and hair of the first class shall be eleven cents per pound. * * *

380. On women's and children's dress goods, * * * of which the warp consists wholly of cotton or other vegetable material with the remainder of the fabric composed wholly or in part of wool: * * * *Provided*, That on all the foregoing, weighing over four ounces per square yard, the rates of duty shall be five per centum less than those imposed by this schedule on cloths.

The appellant imported woollen dress goods with cotton warp weighing over 4 ounces per square yard. The collector, acting under the proviso to section 380, after fixing the duty at 44 cents per pound and 55 per cent ad valorem, deducted 5 per cent from this total sum and assessed the remainder. The importer protested and claimed that the proviso should be read as reducing the ad valorem rate by 5 per cent, making the ad valorem rate 50 per cent instead of 55 per cent, whereas by the collector's method, deducting 5 per cent on the aggregate, it left the rate at 52½ per cent. This contention was overruled by the Board of General Appraisers.

The contention of the protestant is that by using the words "rates of duty" Congress indicated a purpose to lower the ad valorem rate by the per cent named. This contention would be persuasive if we were dealing with an imposition consisting wholly of an ad valorem rate, but such is not the case here. If the proviso should be construed to read that "on all the foregoing, weighing over 4 ounces per square yard, the [ad valorem] rates of duty shall be 5 per cent less than those [*i. e.*, the ad valorem rates] imposed by this schedule on cloth," the importer's contention would be unanswerable so far as it related to the ad valorem rates, and it would seem that either this proviso should be construed as paraphrased or that the rates of duty should be given a construction which would admit of a deduction from the aggregate of duty assessed under the provisions of the act.

As there is no percentage which can be reduced by the mere process of subtraction which fixes the specific rate, resort must be had to a computation to ascertain what the 5 per cent amounts to. It is very clear that the proviso is not intended to provide a deduction of 5 per cent on the amount of the specific duties and a deduction of 5 per cent from the ad valorem rate. The two methods are inconsistent. We think the better construction is that adopted by the board, namely, that the proviso to the paragraph should be subjected to the same construction as if the 5 per cent had been expressed by the equivalent term, "one-twentieth." This avoids inconsistency, and as is said by the board, 5 per cent less than a given sum is in ordinary understanding one-twentieth less. There would be no room for misunderstanding at all except that arising from the fact that the term "rates" is employed.

The decision of the Board of General Appraisers is *affirmed*.

LARKIN Co. v. UNITED STATES (No. 781).¹

1. RAPESEED OR COLZA OIL.

The contention was made that the importation is not rapeseed oil as assessed, but is a sulphur colza oil, commonly used for soap making. The testimony falls short of maintaining this.

2. REMANDING FOR NEW TRIAL.

A party litigant in an appellate tribunal must stand upon the case as he made it in the lower court; and a case here will not be remanded because the record discloses simply a failure to make proof.—*Stegeman v. United States* (1 Ct. Cust. Appls., 208; T. D. 31240).

United States Court of Customs Appeals, January 23, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26673 (T. D. 31883).

[Affirmed.]

Frederick C. Slee for appellants.

Wm. L. Wemple, Assistant Attorney General (*Frank L. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

The merchandise in question in this case was assessed for duty under paragraph 37 of the tariff act of 1909 as rapeseed oil. The importer protested against this assessment, claiming free entry for the merchandise under paragraph 580, reading as follows:

Grease, fats, vegetable tallow, and oils (excepting fish oils), such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specially provided for in this section.

It appears that the Government chemists reported this as crude rapeseed oil. The only testimony offered at the hearing was that of one witness produced by the importer, who was a chemist in the employ of the importer, and who testified that the merchandise in question was not properly designated as rapeseed or colza oil, but was known as a sulphur colza oil, produced as a by-product from the pressed cake from which the original rapeseed oil had been extracted, using for that purpose carbon bisulphide.

The importers also sought to show by this witness the facts essential to bring this oil under paragraph 580, above quoted, namely, that it is commonly used for soap making and is not fit for uses other than soap making or stuffing or dressing leather.

The witness showed no familiarity with the commercial classification of this oil. He testified that he never had had any experience with this sulphur colza oil until its importation in the present instance; that he knew of no purpose for which sulphur colza oil could be used except for soap making; that pure colza oil was used for lubricating

¹ Reported in T. D. 32231 (22 Treas. Dec., 182).

purposes and, as he believed, in the rubber industry. He was asked this question:

Q. If you have never had any experience with the sulphur colza oil until this importation, how can you tell what uses it can be put to?—A. I can tell by the burning.

Q. You can tell it is neither fit for burning nor lubricating?—A. Yes, sir; I stated I did not know of any other purpose it is fit for.

Q. It may be fit for other purposes and you not know them?—A. Yes, sir.

It was incumbent upon the importers to bring the importation within the section relied upon. The Board of General Appraisers found that this testimony was not sufficient to establish that this oil was fit for no other use than soap making. We agree with the Board of General Appraisers that this testimony fell far short of making out the protestant's case.

The case is quite unlike that of *Klipstein v. United States* (1 Ct. Cust. Appls., 122; T. D. 31120), as in that case the testimony of a dealer in the oil in question, shown to be familiar with the uses for which the product was sold, was given. The record in the present case is entirely silent as to what the commercial use of the oil in question is. An employee of the importer, who had no acquaintance with the oil itself except that derived from the present importation, proceeded, upon a chemical analysis, to express an opinion that it is suitable for soap making and is not suitable for lubricating purposes or as an illuminant. But whether it is suitable for any other purpose does not appear. For aught that the record discloses it might be used commonly and commercially for other purposes than those named in the paragraph relied upon.

It is urged by counsel for the appellant that, in case the court should be of the opinion that there was a failure on the part of the protestant to establish the case by a preponderance of evidence, the case should be remanded for a new trial. No such power is given to this court by the organic act. In *Stegeman v. United States* (1 Ct. Cust. Appls., 208; T. D. 31240) we had occasion to consider this question. It is said of the power given to remand a case for further proceedings by the Board of General Appraisers:

This authority is coupled with the authority to affirm, modify, or reverse, and this is the authority to affirm, modify, or reverse the decision by the Board of General Appraisers upon the case as made before them, and undoubtedly on such a hearing, if it should appear that the board has erroneously excluded testimony or committed any other error of law the correction of which would involve of necessity a new trial of the case, the power to remand for this purpose would exist as it does in all cases in appellate courts, reviewing a case on writ of error.

It seems obvious that the intent of this act was to confer upon this court appellate jurisdiction only, and that that appellate jurisdiction partakes of the nature of an appeal in equity, and authorizes a determination of questions of fact involved. * * * But such an appeal does not involve a trial *de novo*, but a determination of the case upon the record made up by the Board of General Appraisers. * * *

The manifest purpose of the act of August 5, 1909, was to provide for a speedy determination of all cases of protest. It does not contemplate that a party may present his case piecemeal, and this

was so determined in *Stegeman v. United States*. As we held in that case, it is within the power of Congress to place such limitations upon the judicial power of a court, dealing with customs-revenue cases, as it may see fit from time to time to fix. That limitation does not admit of our granting a new trial in a case where it simply appears that there has been a failure of proof. It is possible that this practice may result in injustice in some cases, but evidently it was the deliberate judgment of Congress that such occasional inconvenience or apparent injustice might better be borne than that delay and uncertainty should be permitted. Indeed, it is not the exception in judicial proceedings, but the rule, that a party litigant must in an appellate tribunal stand upon the case as he has made it in the lower court. That a case may be at times imperfectly presented necessarily follows, and that the appellate court is without the power of relief in such cases also follows.

The decision of the Board of General Appraisers is *affirmed*.

UNITED STATES *v.* SHELDON & Co. (No. 494).¹

GUM RESIN A CRUDE DRUG NOT ADVANCED IN CONDITION.

The importation is of gum resin or rosin. This is the product of the ordinary treatment that oleoresin or crude turpentine is subjected to in order to separate its two contents. By the application of heat the turpentine is vaporized, passed through a worm, and condensed; the resin content being at the same time run off from the boiler of the still into a vat, but cleansed, in passing through screens, of chips, bark, insects, and dirt, accumulated in taking the turpentine from the tree. These processes have been uniformly held not to advance an article from its crude state; not to advance it either in value or condition as those terms are used and uniformly construed in revenue statutes. They merely serve to get the article by itself. The terms "in a crude state" are broad enough to include as "crude" all the grades of resin shown by the record in this case.—*Roessler & Hasslacher Chemical Co. v. United States* (94 Fed. Rep., 822); *United States v. Godwin* (91 Fed. Rep., 753); *Schoenemann v. United States* (119 Fed. Rep., 584).

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7107 (T. D. 30982).

[Affirmed.]

D. Frank Lloyd, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Curie, Smith & Maxwell (*W. Wickham Smith* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This case concerns an importation from southern France and Spain of merchandise returned by the appraiser and assessed by the collector at the port of Chicago as "gum resin" advanced in value or condition, as provided in paragraph 20 of the tariff act of 1909.

¹ Reported in T. D. 32245 (22 Treas. Dec., 204).

It is claimed by the importer to be entitled to free entry under paragraph 559 of said act as "gum resin crude, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture."

Other claims which we deem irrelevant are made.

The imported article is the well known translucent, compact, brittle, pulverizable rosin of commerce imported in barrels.

It is agreed by both parties to the action, and seems to have been considered in the commerce of the country for many years, that this article is a gum resin. Confirmation of this from 1884, at least, to date will be found in T. D. 6694; G. A. 1528 (T. D. 12977); G. A. 3063 (T. D. 16099); G. A. 3133 (T. D. 16304); G. A. 3892 (T. D. 18090), and the record.

This controversy concerns the single question whether, or not, such resin so imported has been "advanced in value or condition by any process or treatment whatever from the condition of a crude drug to a condition beyond that essential to the proper packing of the drug and prevention of decay or deterioration pending manufacture."

While the merchandise was produced in southern France and Spain, the testimony in the record is almost wholly devoted to the methods of production of resin or rosin in this country.

The terms "resin" and "rosin" seem to be used; commercially at least, interchangeably.

The method of production abroad is set forth in a certificate duly authenticated and admitted in evidence. It recites:

The raw rosin or "gemme" (gum of trees) is harvested in pots placed near the lower part of incisions made in seaside pines.

This matter, which contains a certain proportion of water and impurities, such as wood shavings, pine needles, and insects, is brought in barrels to the works, which are located near the place of production.

Such works consist of boilers, used for the purpose of melting the "gemme" (gum of trees) in order to remove therefrom all the impurities contained therein, and of stills (alembics) of various systems for extracting by means of distillation the oil of turpentine which the "gemme" (gum of trees or resin) contains. The residuum left from said distillation *leaves then the still (alembic), passes through sieves and forms the so-called colophony or rosin* ("Brai").

Its color is clear during the first months of the harvest, April, May, and June, and it becomes dark during the end of the campaign in the months of October and November.

The colophony is thereupon placed in barrels of pine wood which contain, in general, 3 to 400 kilograms of matter.

The most detailed, as well as probably the most accurate, description of the process of the production of resin is found in Spens' Encyclopædia (vol. 3, p. 1680):

Rosin or Colophony and Rosin-oil.—The several kinds of rosin, colophony, or resin proper are the solid residues obtained by the distillation of the turpentine. The crude turpentine or oleo-resin is submitted to aqueous distillation in a copper

vessel, in place of the old-fashioned iron still which produced a red-coloured oil. The still * * * is charged with crude oleo-resin in the early morning; heat is applied * * * until the mass attains a uniform temperature of 100°-158°. * * * The distillation continues, a mixture of water and turpentine-oil passing over into a wooden separating-tub; * * * when the liquid shows 9 parts of water to 1 part of turpentine-oil, the distillation is stopped, the still-cap is removed, *and the hot rosin remaining in a fluid condition in the still is drawn off by a tap near the bottom, and passed through a fine strainer into a vat, whence it is baled by long-handled wooden buckets into barrels for sale.*

The grade of rosin depends (1) upon the quality of the crude oleo-resin under treatment, and (2) upon the skill with which the operation is conducted.

In Thorpe's Dictionary of Applied Chemistry (vol. 3, p. 343), article "Resins; Colophony," it is stated:

Colophony.—Colophony is the residue which remains after the volatile oil has been removed by distillation from the oleo-resins, the crude turpentine which exude from the various species of coniferae. It varies somewhat, according as it is derived from the one or the other species, *and with the method employed for its production.* The browner resins are mostly of American origin, * * * while those of a lighter colour come by way of Bordeaux, being the yield of * * * an inhabitant of the districts of Landes and the Gironde. It varies in colour from pale amber to dark red-brown.

These described processes of the production of the resin of commerce differ in no substantial particular from those described by the several witnesses in this record.

There is no controversy that the material which first exudes from the trees and is caught in the receptacles is an oleoresin generally known as "crude turpentine"; that the distillation process employed, to which this oleoresin or crude turpentine is subjected, vaporizes the turpentine in the oleoresin, whereupon it alone passes through the worm of the still, is cooled, condensed, and collected in receptacles. The heat applied by this process is not sufficient to vaporize and therefore distil the rosin content of the oleoresin, but melts it sufficiently only to permit of the escape of the turpentine. By and as a part of the same process the residue of the oleoresin in the still *is let off through strainers* into a vat. The straining is but a minor incidental part of the process of separating the two contents of the oleoresin. Before it cools it is deposited in barrels, where by the action of the air it becomes hardened. The products of this operation are turpentine and the resin or rosin of commerce. The turpentine has been distilled, in that it has been vaporized, passed through the worm of the still, and then condensed. The rosin content has been heated, but not distilled or vaporized, and in being run off from the boiler of the still into a vat is passed through screens which take therefrom the chips, barks, insects, and dirt which accumulate therein in the reclamation of the oleoresin from the trunk of the tree. It is then deposited in the kegs of commerce. In this condition, as thus

deposited in the kegs of commerce, so far as this record shows, it in no sense differs in the slightest particular from its condition as found in the trunk of the tree. Nor does it differ in the slightest degree from its condition during any step of its processing from the tree to the barrels of commerce save that it is separated by heating from the turpentine in one instance, and separated by screening from dirt and chips in the other instance. It has had no process applied thereto, save that of heating to permit the escape of the turpentine, and, if it may be dignified by the term process, the straining into the vat through sieves taking therefrom the chips, barks, insects, and dirt, not therein an element of its natural condition, but deposited therein as an accident of its reclamation from its parent condition. The straining does not advance its crude or natural condition *per se*, but more nearly restores it to its crude or natural condition.

Considering the resin content alone, as in the tree, its crudest condition, the object being to take it from the tree and pack it in barrels, no process or treatment has been applied thereto which has advanced its value or condition as found in the tree, other than essential to the *proper* packing. The first process recovered it from the tree but did not change the rosin content *per se*. The second process reclaimed it from the turpentine and the dirt, leaves, and insects deposited therein by the first process, but did not change the rosin *per se*. The result of all these processes left it in a condition for proper packing and advanced it no further from its crudest, natural, parent condition in the tree than essential to its proper packing. In the language of the court in *United States v. Godwin* (91 Fed. Rep., 753), "it had no effect upon the article itself, other than to get it by itself." Each process was essential to pack the drug found in the tree in a condition nearest possible to its parent or crudest condition. So that, considered from the mechanical standpoint, if "crude" in the statute refers to the condition of original repose of the article, this article has not *as imported* been advanced therefrom further than essential to proper packing.

While it appears from the record that the oleoresin or crude turpentine as it exudes from the tree is sometimes the subject of commerce in this country, it does not appear from the record that such is an article of commerce abroad, or ever has been imported. When so bought and sold in this country it is as "crude turpentine" and not as "resin." Likewise, while it is shown from the record that there sometimes appears in the commerce of this country an article styled "unstrained resin," which consists of the resinous residue left in the boiler of the still having there within the chips, barks, insects, and dirt, it does not appear by the record that such is an article of commerce abroad or is or ever has been imported.

The contention of the Government in this case, as stated by the Assistant Attorney General (Record, p. 71), is:

I am going to show that the crude gum resin of the paragraph is this crude turpentine, and inferentially and also by direct testimony I shall show that the resin is an advanced product made from that.

This position, however, counsel for the Government seems to have abandoned at the hearing in this court, and the position taken that the residue in the still which has not completed its ordinary processing to become resin, but which is sometimes bought and sold as "unstrained resin," is the crude resin of commerce, and that the straining constitutes an advance in value or condition.

When and as it comes forth in due and regular course from this mechanism of production it becomes the article known in trade and commerce and in science as "gum resin" or rosin. The fact that in some cases an incomplete production called "unstrained" resin is put upon the markets, necessarily produced by eliminating part of the regular process of producing resin, does not militate against the contention that the true scientific and commercial article is the one produced in the regular process. The fact that the immature article is bought and sold as "unstrained" resin indicates that it is not the true resin which is bought and sold as "resin" only, the purchaser indicating the color or other quality, all of which facts are conclusively shown by the Government's witnesses. "Unstrained" as here used plainly implies unfinished or partly processed resin. It is not the common resin of commerce either as shown by this record or the lexicographic definitions thereof.

As imported and as bought and sold in this country the merchandise is a brittle, solid mass in barrels. Its condition forbids it being subjected *per se* to final or further uses without substantial processes being applied. If used for making oils it must be treated with sulphuric acid and then caustic soda and distilled. As medicinal ointments it must be pulverized and compounded with other medicinal ingredients. If in varnishes, refined and combined with linseed oil. If in soap, by distillation and combination with lime, soda, and other alkalies.

The record shows that a variety of grades of resin are produced. There is a consequent variety of prices dependent upon the grade of the article. Among the well recognized grades of resin are those dependent upon color. Some of the witnesses speak of "unstrained" resin as a grade of the commercial article. Each grade is known and recognized in commerce and produced by a single process, the output of which becomes, for the first time, one of the grades of the resin of commerce. By the slightest change in the process there would be produced a different grade. The increase

of the heat in the same apparatus will result in a light or a dark resin. The young tree of to-day will produce a light grade, whilst the same tree years hence will produce a dark grade. Likewise, the grade may depend upon the country of origin or the geography of any particular country whence it comes. We have authority that the imported resins of southern France and Spain, such as this importation, are much lighter in color than those of this country. Each is equally when and as produced gum resin in a crude state.

It is contended, as stated by the Government counsel, that only the crudest form or grade of resin known to the commerce of this country comes within purview of paragraph 559. This is not in accord with the decisions and is an interpretation we think not authorized by the language of the statute. The statute does not say "drugs * * * in the crudest state," but "drugs * * * in a crude state." There are undoubtedly many grades of almost if not every class of crude drugs. One may be more crude than another, but so long as it is in a crude state, within the definitions, it is equally within the terms of this statute. To hold otherwise would confine the application of the statute, not to all such drugs in a crude state, but to those only in the crudest state of the particular crude drug. Indeed, the use of the article "a" in the paragraph in the place of "the" indicates any one of several "crude" states that may occur.

Examples may be found in *United States v. Merck* (66 Fed. Rep., 251), wherein the court expressly said of a drug held crude that the imported article "varies much in quality." In *G. A. 4191* (T. D. 1952S), quoted *infra*, the examiner at the port of New York testified concerning crude gutta-percha, held to be free, and uniformly passed as free as crude gutta-percha, that what "he had examined at different times varied very considerable in character, some being almost pure gum, while others contained large proportions of woody fiber, debris of the tree, etc.; that such samples varied in color, the outside of some being light brown, others grayish color, and the inside of a lighter shade."

Under the construction contended for only the crudest form of this gutta-percha could be admitted free, and so, without doubt, with reference to every article coming within the provisions of paragraph 559. Such a construction would render the statutes practically nugatory.

It would seem that where the differences between two grades of the same drug resided solely in the presence in the one of impurities which can be removed by processes which "do not change the character of the drug itself," as in *Roessler & Hasslacher Chemical Co. v. United States* (94 Fed. Rep., 822); and which impurities are "not of the article itself," as in *G. A. 6370* (T. D. 27360); *T. D. 19123*; "other than to get the drug by itself," as in *United States v.*

Godwin (91 Fed. Rep., 753); "though adding slightly to their value" do not amount to "an advance in value or condition" as those words are used in this paragraph, as held in *Schoenemann v. United States* (119 Fed. Rep., 584).

Conceding for the purpose of consideration that the residue in the still in the midst of its processing and before it is passed through the screens in the process of production is the resin of commerce in its crudest form, the authorities are uniform that the mere straining of a product or article to recover therefrom the chips, barks, insects, dirt, etc., or any extraneous matter, does not constitute an advance in the value or condition contemplated by the tariff revenue statutes. This is true, indeed, even where the presence of such foreign substances are not accidents of the process of production, but are incidents of its parent condition.

What constitutes a "crude" article under the tariff laws not advanced in condition or value has long been well established by customs interpretation.

Screening and cleansing are not refining. Heating and drying are not necessarily manufacturing processes, and straining, cleansing, screening, heating, and drying are not held to advance an article from its crude condition to an advanced condition or value.

As early as 1891, the Board of General Appraisers in passing upon elaterium, G. A. 747 (T. D. 11572), which is the sediment of the juice from the squirting cucumber, said:

The only formula we have for preparation of this article is from the British Pharmacopoeia, as follows: "Cut the fruit lengthwise and lightly press out the juice. *Strain it through a hair sieve*, and set aside to deposit. Carefully pour off the supernatant liquor, *pour the sediment on a linen filter*, and dry it on porous tiles, in a warm place."

While elaterium may be a crude drug, the board is of the opinion that it is not a drug such as the beans, barks, * * * gums, etc., enumerated in paragraph 560, all of which are natural products obtained without artificial manipulation.

The case arose under the tariff act of 1890, and was on appeal ultimately decided by the United States Circuit Court of Appeals for the Second Circuit, *United States v. Merck* (66 Fed. Rep. 251), reversing the decision of the board. The exact provision of the statute within which it was sought to bring the article was—

560. Drugs, * * * in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture. * * *

Notwithstanding the fact that native foreign substances had been screened from the imported article it was held by the court to be within the paragraph as not refined and a crude drug. The court said:

It is cut in two, when the juice flows out, which is allowed to stand until the sediment is deposited at the bottom. The juice is poured off, and the sediment is dried as quickly as possible, to avoid fermentation. The British Pharmacopoeia contains

the following formula for the preparation of the drug as imported: [Here is quoted the definition given by the board.]

It is imported in little cakes, *and varies much in quality*. It is not used in this form by the physician. * * * It is not only a drug, but a crude drug, and is the crudest form in which elaterium is known. It is not reasonable to call the simple process of evaporation and of drying, by which it has been brought into the condition of a drug, a process of manufacture which has advanced the article beyond the condition of a crude drug. The juice has become, by evaporation and drying, a crude drug, but nothing more.

In G. A. 3687 (T. D. 17639), the subject of consideration was papaw milk powder. The board found:

We find from the evidence that the article is a powder, obtained from the papaw melon, or *carica papaya*. To secure this material the melon is sacrificed and the juice which runs is caught in pans. It is then taken from the pans and laid on flat surfaces in the sunlight until the moisture is evaporated. The resulting solid is *then passed through a sieve* for the removal of mechanical impurities. It is then packed in tins and exported.

It was held by the board that this article was free of duty under paragraph 470 of the tariff act of 1894 as—

Drugs, * * * which have not been advanced in value or condition by refining or grinding, or by other process of manufacture. * * *

The United States Circuit Court, Southern District of New York, *United States v. Godwin* (91 Fed. Rep., 753), in passing upon this principle and subject matter, stated:

This article is a powder from the juice of the papaw melon, caught in pans, dried in the sun, *sifted* to take out foreign substances, packed in tins, and exported. * * * It was such a drug as those named, if not one of them, and was not edible. Drying in the sun was not refining, nor a process of manufacture. *Frazee v. Moffitt* (20 Blatch., 267, 18 Fed. Rep., 584). *Neither was the sifting out of mechanical impurities. It had no effect upon the article itself, other than to get it by itself.*

The books fairly teem with decisions supporting this principle. Where the drying, or sifting, or screening, or other manipulation of the imported article does not affect the article *per se*, as found in its natural condition, "other than to get it by itself," such does not constitute an advance in value or condition of the article *per se*. It has uniformly been held, for example, that seeds, to make which a commercial commodity, must in every instance have been preceded by the cutting of the parent stalk, the separating of the seed therefrom, and the screening out of chaff and other impurities, thus reclaiming it in its natural condition, do not thus advance from a condition as a *crude* drug, where such are drugs. And that is true and such process must be applied before few if any of the associate drugs covered by paragraph 559 can possibly be packed.

"Barks" are separated and put in that condition by cleaving, as are bulbous roots, fruits, and flowers. "Dried fibers" are separated by cleaving in the first instance and the exposure to the heat in the second instance, which is all that has been done to the rosin. "Dried

insects" are subjected to heat in order that they may be dried. While it is true that the natural heat may accomplish the result ordinarily, artificial heat is usually applied just as in the case of rosin. Grains are not alone separated from their natural condition by cleaving, but they are *cleaned by screening*, a precisely similar process to that whereby rosin is run through a screen into the vat as it comes from the boiler of the still. The comparison is the more instructive because the paragraph itself directs it when it states, "drugs *such as*," etc. See G. A. 1379 (T. D. 12730); G. A. 1377 (T. D. 12728); G. A. 1376 (T. D. 12727); G. A. 1375 (T. D. 12726); G. A. 2151 (T. D. 14152); G. A. 523 (T. D. 11080); G. A. 1381 (T. D. 12732); G. A. 1380 (T. D. 12731); G. A. 1379 (T. D. 12730); G. A. 5272 (T. D. 24204); G. A. 4171 (T. D. 19454), and decision before and herein-after cited.

In G. A. 4191 (T. D. 19528) the question was whether the imported article was crude gutta-percha. The board stated:

That it was *crude gutta-percha*, differing from the crude gutta-percha of commerce only in having a *portion of the impurities removed*, and been made more uniform in grade by reboiling, and thus *fitting it for use especially in making golf balls*. * * *

Dr. Wainwright, chemist in the laboratory in this port, who made an analytical examination of the merchandise, testified in substance that it was freer of such impurities as woody fiber, sand, and the like than the samples of so-called gutta-percha with which he had compared it, but that it contained a small amount of such impurities. He also testified that the crude gutta-percha he had examined at different times varied very considerably in character, some being almost pure gum, while others contained large proportions of woody fiber, debris of the tree, etc.; that such samples varied in color, the outside of some being light brown, others grayish color, and the inside of a lighter shade; that the sample of the merchandise in question was darker than any gutta-percha he had seen before, and was more uniform and homogeneous in texture. * * *

The crude gutta-percha of commerce, therefore, has, as a rule, undergone a process of boiling and contains impurities in varying percentages which must be removed by expensive and difficult processes in order that the gutta-percha itself may be profitably utilized.

It does not appear that the merchandise here in question has been subjected to a process other than that of boiling, and it seems that this was done for the purpose of eliminating impurities and rendering the article uniform or homogeneous in texture. Some impurities still remain. Aside from these the only constituent of the merchandise is gutta-percha, which has not undergone any process of manufacture whereby its commercial name or essential character has been changed. It has simply had a greater proportion of the adulterants or impurities removed from it than most so-called crude gutta-percha of commerce."

The article was held to be free as crude gutta-percha.

In G. A. 4585 (T. D. 21714), the subject of decision was spruce gum. The board stated:

The gum is in small, irregular lumps, which, after being scraped from the tree, have been *cleaned by hand* of sticks, bark, moss, and similar extraneous matter.

It was held to be crude and entitled to admission free of duty under paragraph 548 of the tariff act of 1897.

In G. A. 4606 (T. D. 21804), the question was whether the product of the sago palm was free of duty as "crude sago." The board stated the facts as follows:

It appears from the testimony in the case that the article before us is a product of the sago palm, and is made in the following manner: The outside wood part is partially taken off, and the pith, from which the sago is produced, is allowed to rest and partly decompose. It is then *pressed through a linen cloth* into a trough of flowing water, which carries off the inert matter, sticks, etc. The resulting mass, which is a thick and heavy paste, is placed in a cylinder and subjected to a rotary motion, which gives it a rounded form, then partially baked, again rotated and partially baked, and the process repeated until the article assumes the condition in which it is imported.

Obviously the reclaimed mass is the identical thing from which the sticks, trash, etc., have been separated, and is the same mass which goes into commerce. The board held that it was entitled to free entry as crude sago.

In *Littlejohn v. United States* (119 Fed. Rep. 483, 484), the United States Circuit Court, Southern District of New York, confirmed that view and held that the pulp of the sago tree was properly dutiable as crude sago. The court, in part, said:

The second claim of the Government is that it is a completed article when imported, and is fit for present use. This fact might be decisive in some cases, but is not a universal or safe test. In this case *the processes of cleansing* are essential to fit it for trade and commerce in this country; they neither refine nor manufacture it, but *only serve to remove the impurities*. Such processes are not sufficient to change its character from a crude product to a manufacture.

In G. A. 6303 (T. D. 27162), the subject of consideration was fir balsam, drawn from the tree and submitted to a process of straining for purification. The board said:

A number of trade witnesses were examined at the hearings, and there was substantial agreement among them that the merchandise is in the crudest form in which it is bought and sold in trade in the United States, and while the assistant appraiser and the official examiner connected with the drug department in the United States appraiser's office at the port of New York expressed the opinion that the merchandise was in the crude form, nevertheless they state that they had seen it imported in less pure condition—i. e., containing pieces of the bark of the tree.

It is in evidence on the part of the protestant that after this balsam was drawn from the tree it was submitted to a process of straining for the purpose of eliminating therefrom "*bits of sticks, bark, chips, and dirt*." Ordinarily such a process of purification might be considered as a process of refining, provided the merchandise was usually imported without being submitted to such process; but on the record before us we think the opinion is justified that such a process of purification is not to be considered as a refining of the merchandise since it appears that it is regarded by the trade generally as being in the crude condition as thus imported and is bought and sold as such.

The merchandise was found to be a drug in a crude state, not
ced in value or condition, and entitled to free entry.

In G. A. 6370 (T. D. 27360), the subject of consideration was gum copal. The board said:

Paragraph 548 provides, among other things, for "gums" and "gum resin." The Century Dictionary says that copal is "a hard, transparent, amber-like resin, the product of different tropical trees, melting at a high temperature, and used in the manufacture of varnishes." It seems to us quite clear that it comes within purview of paragraph 548 and should be admitted free of duty.

The board then expressly rests its decision and approves of the view taken by the Assistant Secretary of the Treasury in T. D. 19123. That T. D. is instructive, in that it gives the view of the department as well as the Board of General Appraisers upon these processes and this subject. It concerns gum copal, and states:

I have to inform you that the department is of the opinion that the *removal of scurf from such gum is not a process of advancement in value or condition from a crude state within the meaning of paragraph 548 of the tariff act of July 24, 1897, * * * inasmuch as the scurf is no part of the article itself, but simply foreign matter adhering thereto, and consequently that the merchandise in question is entitled to free entry as a gum resin under said paragraph.*

In the early case of *Frazee v. Moffitt*, decided in the United States Circuit Court, Northern District of New York (18 Fed. Rep., 584, 587), we find language announcing distinctly this same principle. The question was whether, or not, baled hay was, or was not, raw or a manufactured article. The court said:

Many articles are properly called raw which have undergone some manipulation. Cotton is picked from the bolls, and cleaned by ginning, and baled. Yet it is raw cotton in the bale. Wheat is cut, and the grains are threshed out, and then subjected to a cleaning machine, and then bagged. Yet it is raw wheat in the bag. So with other grains. The cotton and the grains undergo such change and preparation as exposure to light, and natural or artificial heat, and air, and the manipulation they receive, produce, or allow, be it more or less. Yet neither the cotton nor the grains would be said to be manufactured. Salt and sugar are new articles. Cotton and grains are the same articles they were when on the plant with its roots in the earth. So hay is the same article it was when it was stalks of grass with roots in the earth. * * * Dried apples would not be called a manufactured article, though the apple is peeled and cored and sliced, and dried by exposure to the sun and manipulation. The substance of dried apples is still apples. The substance of dried grass or hay is still grass. Change of name and manipulation do not necessarily constitute manufacture. * * *

The word "crude" as used in tariff laws has by construction and a long and consistent line of decisions been given a meaning somewhat variant from its common and accepted meaning, the frequent reenactment of the term in the statute having been tantamount to a confirmation thereof. What constitutes a refining or advance in condition from the crude state of the article has, likewise, been the subject of judicial and legislative construction, and it is not every manipulation, though it may add something to the value or condition of the article, which may be held to bring it within such language of the

statute. Its presence in a tariff act requires that it be construed with a thought to its apposite conditions provided in the act, to wit, manufactured or a condition of substantial advancement by processing.

We find confirmation of this statement. Thus in *Roessler & Hasslach Chemical Co. v. United States* (94 Fed. Rep., 822, 823) the court said:

As Dr. Baker states, it is crude as a metal, but not crude as a mineral. It is not "crude" in the common or dictionary sense of an article not manufactured, but it is "crude" in the sense of an article not refined. I think it is an article in a "crude" state, in the tariff sense of "crude."

It appears from an examination of said act that Congress defines articles of this character as crude, not necessarily by inquiring whether they may or may not have been the result of some manufacture, but by reason of the use to which they are to be applied. Thus, in said act of 1894, the manufactured article glycerin is spoken of as crude, not purified; aluminum, as a manufactured article in crude form; and tartar, bladders, sounds, bones, camphor, coal tar, paper stock, and potash, as crude. * * *

Inasmuch as all of said articles or substances have necessarily undergone some preliminary process of manufacture, and are considered crude only by referring to the purpose for which they are to be used, I think that this article may be "crude" under the tariff designation, although it is the result of a manufacture; and I am inclined to think, in opposition to the contention of the United States, inasmuch as this article is ordinarily only the accidental resultant product from the manufacture of zinc, that it is in its nature a crude by-product. *That it is sifted without changing its character*, and that care is taken not to expose it to the air, is not sufficient to make it a manufacture.

In *Schoenemann v. United States* (119 Fed. Rep., 584, 587), the Circuit Court of Appeals, Third Circuit, announced the same principle, reversing the circuit court, board, and the collector. The question was whether certain shells from which marine animals had been taken and the shells themselves cleansed, by being put into a tub with chloride of lime and then washed with clean water, *in order to remove all animal matter, dirt, and offensive smell*, were free, as "shells not sawed, cut, polished or otherwise manufactured, or advanced in value from the natural state." The court stated:

It is, however, contended that the shells have been "advanced in value from the natural state," within the meaning of those words in the paragraph referred to, and that therefore they are excluded from the free list. We do not think, however, that the cleansing of these shells, in the manner disclosed by the evidence and already discussed, *though adding slightly to their value*, effected a change in them "from the natural state." Seashells are the hard, organized substances forming the exterior covering and protection of certain marine animals, and these hard, bony coverings are not changed from their natural state by having these animals and the adventitious and foreign matter clinging to them removed. They are no part of the shell, and the natural state of the shell remains after this removal takes place. It would be as reasonable to say that the natural state of the shell existed only when the marine animal, which it contained and protected, was present, as to say that there was a change from the natural state, wrought by cleansing it from foreign substances which were no part of it.

These authorities are in exact accord with the conclusion of Judge Combe in *Standard Varnish Work v. United States* (59 Fed. Rep.,

In that case there were placed in the retort palm oil, animal

grease, and tallow, which were boiled in the process of obtaining stearin. It was the residuum which did not find its way through the worm of the retort that was the subject of consideration by the court. The court said of this:

It is not in itself a raw material; it is not found in nature; and, although something left over in the manufacture of candles, it is no longer either the tallow, or the animal grease, or the palm oil.

It is exactly true. The residuum there that came from the retort was the component of the various things that went into the retort, "no single raw material coming therefrom." The contrary is the case here; the oleoresin, which consists of resin and turpentine, is put into the retort and the residuum taken therefrom is *the single raw material, rosin*. It does consist of only "one of the things placed in the retort," and does not consist of a combination of things. It is "not chemically a new body, or a new creation." On the contrary it is one of the same elements, one of the same creations, one of the identical things that was placed in the retort before and which is returned therefrom in its natural state.

Further illustration of a similar definition attached to the word "crude" as used in tariff revenue laws is found in *McKesson v. United States* (113 Fed. Rep. 996), wherein the merchandise was the product of a process by which the gangue or slag and rock were removed and only the ore of antimony was imported. It was held to be crude within that term under the tariff act of 1897.

This court in repeated decisions has approved that doctrine. See *United States v. Salomon* (1 Ct. Cust. Appls. 246; T. D. 31277). And in *United States v. Michelin Tire Co.* (1 Ct. Cust. Appls., 518; T. D. 31544), this court held that where old scrap or crude rubber was chopped and there was separated therefrom particles of iron, such as rivets, valves, etc., grinding the rubber into smaller particles, chemically treating, washing, riffling, and blowing these, are all done to separate the rubber from the other component materials of the old scrap or refuse from which it was reclaimed; in short, to recover or reclaim the rubber content of these old articles in a shape suitable for transportation or marketing did not carry it out of the category of "crude" rubber in paragraph 579 of the tariff act of 1909.

Wherefore it is concluded:

1. If the "crude state" of the statute refers to the resin as found in the tree, the resin as imported in the barrels is identical therewith except so far as it may necessarily be changed or advanced by its recovery therefrom and its "proper packing" in the barrels.

2. The processing of the crude turpentine to the resin in the vats or barrels is by a single mechanism, one of the results of which is to eliminate the chips, bark, and dirt. If a part of this mechanism is removed or a part of the process eliminated the product is not the

well known resin of commerce or science, but an unfinished product or resin called "unstrained resin."

.3. If "unstrained" resin be deemed a finished article, then it becomes one of the several grades of the resin of commerce. While there is nothing in the record to show that article more crude or less valuable than many of the other grades, assuming it to be the crudest grade, it does not exclude the other grades of resin from the terms of the statute, "in a crude state," for that term is broad enough to include as "crude" all the grades of resin shown by this record.

4. Assuming that the resinous residue in the midst of the processing of the crude turpentine at the point where it is separated from the turpentine is the resin of commerce, and that it is thereafter separated from the chips, bark, and dirt by screening, those processes have been uniformly held not to advance an article from its crude condition either in value or condition as those terms are used and uniformly construed in revenue statutes.

The article therefore is entitled to free entry, and the decision of the Board of General Appraisers should be *affirmed*.

DISSENTING OPINION.

BARBER, Judge, with whom concurs SMITH, Judge, dissenting:

The merchandise in this case is commonly known as rosin, was imported from London, England, in barrels, and entered at the port of Chicago early in 1910. We understand it was produced in France. It was assessed for duty under paragraph 20 of the tariff act of August 5, 1909, at the rate of one-fourth of 1 cent per pound and 10 per cent ad valorem in addition. It was claimed to be entitled to free entry under paragraph 559 of the same act. Other claims are made in the protest, but are not relied upon here.

Just how the rosin of this importation was made the evidence does not disclose. From what is termed "Collective Exhibit 1," which was received without objection by the board, it appears that rosin is produced in France in the following manner:

The raw rosin or "gemme" (gum of trees) is harvested in pots placed near the lower part of incisions made in seaside pines.

This matter, which contains a certain proportion of water and impurities, such as wood shavings, pine needles, and insects, is brought in barrels to the works, which are located near the place of production.

Such works consist of boilers, used for the purpose of melting the "gemme" (gum of trees) in order to remove therefrom all the impurities contained therein, and of stills (alembics) of various systems for extracting by means of distillation the oil of turpentine which the "gemme" (gum of trees or resin) contains. The residuum left from said distillation leaves then the still (alembic), passes through sieves and forms the so-called colophony or rosin ("Brai").

Its color is clear during the first months of the harvest, April, May and June, and it becomes dark during the end of the campaign in the months of October and November.

The colophony is thereupon placed in barrels of pine wood which contain, in general, 3 to 400 kilograms of matter.

Both the importer and the Government introduced evidence tending to show that in the southern part of the United States rosin is produced in the following manner: Incisions are made in the trunks of certain species of pine trees, the sap flowing therefrom is caught in receptacles at the foot of the tree, at intervals these receptacles are emptied, the sap therein put into barrels and transported to and placed in stills which often are from 25 to 100 miles away from the trees. As placed in the stills this sap contains dirt, chips, leaves, and pine needles. The sap in this condition is subjected to a process of distillation, as a result of which there passes from it a vapor which is conducted through pipes submerged in cold water, resulting in a condensation of the vapor which then becomes fluid turpentine or oil of turpentine. After the distillation is accomplished the residuum in the retort of the still is of a consistency similar to ordinary molasses and is unstrained rosin. If it is sold in this condition it is allowed to flow from the still into a vat and from there dipped into barrels in which it is sold and shipped. These barrels contain about 280 pounds of the product. This is the unstrained rosin of commerce. If it is to be sold as strained rosin it is while hot strained by passing it through three separate wire strainers or screens, the first of coarse mesh, the second finer, and the third finer still, and over the last strainer are placed several layers of cotton or cotton batting which are designed to remove all impurities and to produce pure rosin. This product is the strained rosin of commerce and is classified and graded as to its color, the lightest color commanding the highest price. The importation here is one of the highest of these grades and is ready without any further treatment to be devoted to the purposes for which pure rosin is used. The sap as it comes from the trees, strictly speaking, is oleoresin, but is perhaps more commonly known as crude turpentine.

The purpose and result of the straining process as before described is to remove the dirt, chips, leaves, and other impurities and to make pure rosin. The color is dependent upon various things, amongst them the degree of heat used in distillation, the time of year when the oleoresin is taken from the tree, the age of the tree from which it is taken, and the care with which it is strained. The more, completely all impurities are removed the lighter the color of the rosin, and if too much heat is applied in the process of distillation it tends to darken the color of the rosin product.

It appears that at the port of Chicago from some time in 1888 until some time in October, 1909, merchandise similar to the rosin in this case was admitted to entry free of duty as a gum resin under the paragraphs of previous tariff laws which related to the same articles referred to in paragraph 559 below quoted, and that a soap manufacturer doing business at Philadelphia imported it in the four or five

years prior to April, 1910, also free of duty, but where his importations were made does not otherwise appear.

We insert here paragraphs 20 and 559, respectively, of the tariff act of August 5, 1909:

20. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing or tanning; any of the foregoing which are natural and uncompounded drugs and not edible, and not specially provided for in this section, but which are advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture, one-fourth of one cent per pound, and in addition thereto ten per centum ad valorem: *Provided*, That no article containing alcohol, or in the preparation of which alcohol is used, shall be classified for duty under this paragraph.

559. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums, gum resin, herbs, leaves, lichens, mosses, nuts, nutgalls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing or tanning; any of the foregoing which are natural and uncompounded drugs and not edible and not specially provided for in this section, and are in a crude state, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture: *Provided*, That no article containing alcohol, or in the preparation of which alcohol is used, shall be admitted free of duty under this paragraph.

Paragraph 20 of the act of July 24, 1897, which is the immediate predecessor of paragraph 20 above quoted, instead of the words "but which are advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture," contained these words, "which are advanced in value or condition by refining, grinding, or other process." Paragraph 548 of the act of 1897, which is the immediate predecessor of paragraph 559 above quoted, contained the words "in a crude state and not advanced in value or condition by refining, grinding, or other process," instead of the words, "in a crude state, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture," and these changes in the respective paragraphs are the only ones material to consider in the disposition of this case, but it may be observed that provisions similar to those of the act of 1897 are found in the corresponding paragraphs as far back as 1883.

Under the provisions of the respective paragraphs prior to the act of 1890, there had been much litigation and with the result, as we view it, that no general principle could be deduced therefrom which might be applied in the classification of merchandise seemingly covered by the paragraphs.

To illustrate: The juice which exuded from the papaw melon, after it had coagulated in small lumps thereon, was scraped from the melon, spread upon a board with another board over it, then subjected to a sort of grinding process by which the lumps were reduced to powder, in which condition it was imported, was held not to be entitled to free entry as a crude drug. *United States v. American Ferment Co.* (108 Fed. Rep., 802). Cassia flowers, pulverized, but in what manner not appearing, received the same classification. (T. D. 22653.) So also as to ginseng root, cleansed (T. D. 24883). And likewise as to dyewood, known as fustic, which had been cut into chips (T. D. 17172).

On the other hand, in *United States v. Godwin* (91 Fed. Rep., 753), juice of the papaw melon, caught in pans, dried in the sun, and sifted to take out foreign substances, in which resulting condition it was not fit for medicine, but from which medicine was prepared, was held free of duty. The same treatment was accorded to Guarana paste made from the seeds of *paullinia sorbilis*, produced by shelling the seeds, moistening them in water, removing a papery film, and then pounding them and adding water to reduce the substance to a semi-liquid consistency, it appearing that this was the crudest form in which the article was imported. *Cowl v. United States* (124 Fed. Rep., 475). And in T. D. 27162 Canada balsam, which after it had been drawn from the tree was submitted to a straining process for the purpose of eliminating therefrom bits of sticks, bark, chips, and dirt, was also given free entry. The board in this decision, referring to a prior case, said:

The board would construe the words "advanced in value by refining, grinding, or other process," to mean advanced in value beyond the crudest form known to commerce. There may be exceptions, but it would seem to be the rule that an article is crude when it is in the crudest form known to commerce. There must be some starting point for the advancing process.

Other decisions upon this subject, illustrating the point, may be found in Notes on Tariff Revision (pp. 30 and 31, 703 and 704), all of which were before Congress for consideration prior to the enactment of the tariff act of 1909.

We think it was undoubtedly the intention of Congress in revising these paragraphs to substitute for the varying interpretations of the word "crude" a certain fixed test, or standard, of its own, by which liability to or exemption from duty should be determined, and to make it impossible that one test which had theretofore been applied should be whether or not the merchandise was in the crudest form in which it had been customary to import the same.

This new test would seem to require that the article should be a natural and uncompounded drug, not edible. If such a drug is advanced in value or condition by any process or treatment whatever

beyond that essential to its proper packing and the prevention of decay or deterioration pending manufacture it is dutiable under paragraph 20. If, on the other hand, such natural and uncompounded drugs, not edible, are in a crude state, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing and the prevention of decay or deterioration thereof pending manufacture, they are entitled to free entry.

The importer contends in substance as follows: That this importation is a crude article; that the processes to which it has been subjected before importation are only such as are necessary to prevent deterioration pending manufacture, which he says should be applied to the particular manufacture for which the merchandise is designed; that an article may be used for some purposes for which its fitness for use will be in nowise dependent upon its purity; that on the other hand it may be used for other purposes for which its usefulness and value will be largely deteriorated if it is not free from impurities before being packed for shipment; that it was not the intent of Congress that drugs should be injured for one purpose because the treatment applied to prevent them from injury might be unnecessary when they were used for other purposes, and flatly declares that—

The uncontradicted testimony in this case is that if the rosin after separation from the spirits of turpentine is not strained so as to remove the dirt, chips, leaves, and other substances it will during the process of transportation become darker in color and therefore be of a lower grade in quality and price and less suitable for the use of the soap manufacturer.

The corollary to his position, as stated, would seem to be this: If it should appear that rosin before being strained and purified was found to be an article of commerce and a crude drug and as such entitled to free entry under paragraph 559, if imported for purposes to which it could be used in that condition, that, nevertheless, when it appeared that an importation was designed to be devoted to some purpose for which it could not be used in that condition, in the latter case it should, nevertheless, be entitled to free entry, although it had been purified like the importation at bar. In other words, the question of whether an article was entitled to free entry as a drug under paragraph 559 would be made to depend upon the use to which it was to be applied.

The record in this case is absolutely barren of any fact or suggestion that tends to show that the importation was made for the purposes of making soap, or that it was imported for any particular purpose or destined for any special use, and therefore, tested by his own claim, if it shall be found that the unstrained, unpurified rosin is a subject of commerce, the importer, it would seem, ought not to prevail in this case.

As to his claim that the uncontradicted testimony in the case shows as above stated, an examination of the record satisfies us that it cannot be maintained. We think the evidence establishes beyond question that thousands of barrels of unstrained rosin are annually brought from southern ports of this country to New York and elsewhere and kept in its unstrained condition for months in the original barrels in which it was shipped without any deterioration whatever. Its selling price is not thereby decreased, and witnesses for the importer as well as for the Government agree in saying that the real object in straining the rosin is to enhance the value of the product. In addition to this it might almost seem to be common knowledge that the presence of chips, leaves, dirt, or other foreign substances would be unlikely to change the color of the solid rosin which surrounds such refuse matter.

The board did not find that the rosin deteriorated pending manufacture if it was not strained, as claimed by the importer, but contented itself by holding that the rosin in this case, which, as already stated, has been classified and graded as to color and is one of the highest grades commanding the highest prices and ready without any further treatment to be devoted to the purposes to which pure rosin is used, was a natural and uncompounded drug in a crude state not advanced in value by any process whatever.

We proceed, therefore, to consider whether in any event this rosin is within the class of natural uncompounded drugs in a crude state not advanced in value or condition by any process whatever within the meaning of the paragraph. It surely is not in its natural state because as it exists in nature it is held in solution in the oil of turpentine from which it is separated by distillation. The processes of nature cannot separate the two and preserve both and artificial processes must be resorted to in order to accomplish that result. If the oleoresin, the crude turpentine, be exposed to the air long enough doubtless the volatile oil of turpentine would all disappear, but the residuum would be unstrained, ungraded, and impure rosin. To produce from that residuum the importation here, if it could be produced therefrom, it would be necessary to melt, strain, and grade it.

Without entering into any exhaustive discussion of the meaning of the word "crude" as used in paragraph 559, it may be observed that this word in its ordinary sense and as applicable to its use in the paragraph means a thing in a raw or unprepared state, not fitted for use by cooking, manufacture, or the like and not altered, refined, or prepared by any artificial process. See *Century Dictionary*.

We are unable to see how the importation here answers the call of this definition. It has been artificially produced, it has been subjected to artificial heat, melted, purified, and graded and these processes have been resorted to for the purpose of producing and have

produced an article prepared for a use by artificial means from an article that in its natural state could not be used for the purpose to which it may now be devoted. These processes have designedly been applied to produce these results and to enhance the value of the product.

If the importation is in a crude state not advanced in value or condition by any process or treatment whatever beyond that essential to prevent deterioration pending manufacture within the meaning of paragraph 559 and thereby entitled to free entry, we see no escape from the conclusion that no rosin can be imported which should not receive a like favor. It might, we think, with much force be claimed that the crude turpentine answered to the requirements of the paragraph under consideration or that the unstrained resin remaining after the processes of distillation had been employed was such an article, but that may not be necessary to decide here.

Both the foregoing articles are in large quantities the subject of trade and commerce in this country, one of the Government's witnesses alone shipping from southern ports over 1,000 barrels of the former and another 50,000 barrels of the latter annually. But it is urged that the first appearance of rosin as a separate article of commerce is after the oleoresin has been subjected to the processes of distillation and that because when the rosin first so appears it contains chips, dirt, leaves, and other impurities; that the removal of the same therefrom by the straining processes and the contemporaneous grading of the rosin product does not deprive the graded rosin of its character as a crude article within the meaning of the paragraph. In other words, it is said that the rosin which first appears after the distillation of the oleoresin is a crude product whether strained or unstrained and whether graded or ungraded.

What we have already said indicates that this contention can not be upheld, and in addition thereto it may be observed that every article named as a drug in paragraph 559 appears to be a substance as found in a state of nature and not a thing or substance produced by any process of distillation or other processes whatever. To illustrate: The words barks, beans, berries, balsams, insects, leaves, lichens, mosses, etc., therein used all indicate a thing which is a natural product and ordinarily when obtained in their crude state would require no treatment whatever except drying or shaping to prepare them for shipment or to preserve them from deterioration or decay pending manufacture. They would not, it seems, require to be classified, purified, or graded for that purpose.

This view of the law makes it unnecessary to consider claims of the importer as to the effect of the classification of this merchandise at Chicago or elsewhere, as above stated.

We hold the rosin in this case is not entitled to free entry under paragraph 559 and in our opinion the judgment of the Board of General Appraisers should be reversed.

VANDIVER v. UNITED STATES (No. 614).¹

CORKINE, BY SIMILITUDE LINOLEUM.

The value of the component parts of the importation as of the time these were ready to be joined to complete the article, can not be computed on the data furnished by the record here. The importer having failed to establish his contention that the goods are manufactures in chief value of cork, paper, wood pulp, or wood, and there being some evidence tending to show the goods were dutiable by similitude to linoleum, and accordingly prima facie not subject to the provisions of section 6, tariff act of 1897, the protest in this case must be held to have been rightly overruled. It should be overruled even though the collector had made an unacceptable finding.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, Abstract 24728 (T. D. 31255).

[Affirmed.]

Joseph G. Kammerlohr for appellant.

Wm. K. Payne, Deputy Assistant Attorney General, for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

The appellant in this case imported for the Palruba Manufacturing Co. a certain article of merchandise called "corkine." The importation was returned by the proper customs officer as surface-coated paper and assessed for duty by the collector of customs at Philadelphia at 3 cents per pound and 20 per cent ad valorem under the provisions of paragraph 398 of the tariff act of 1897, which paragraph, in so far as it is material to the case, is as follows:

398. Surface-coated papers not specially provided for in this Act, * * * if printed, or wholly or partly covered with metal or its solutions, or with gelatin or flock, three cents per pound and twenty per centum ad valorem. * * *

The importer objected to the classification of the merchandise, and as grounds of protest set up the claim that the corkine was dutiable either as a nonenumerated manufactured article under the provisions of section 6, or as a manufacture in chief value of cork under paragraph 448, or as a manufacture in chief value of paper under paragraph 407, or as a manufacture of wood pulp under paragraph 433, or as a manufacture in chief value of wood under paragraph 208, which said section and paragraphs are as follows:

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

448. Manufactures of amber, asbestos, bladders, cork, catgut or whip gut or worm gut, or wax, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem.

¹ Reported in T. D. 32246 (22 Treas. Dec., 224).

407. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem.

433. Indurated fiber ware and manufactures of wood or other pulp, and not otherwise specially provided for, thirty-five per centum ad valorem.

208. House or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem.

The Board of General Appraisers overruled the protest and the importer appealed.

On the hearing before the board no evidence was introduced except samples of the merchandise and the testimony of U. G. Goodman and Frederick Lewis Gray, both of whom testified on behalf of the importer. The testimony of the witness Goodman seemed to be based on information derived from the manufacturer rather than on personal knowledge. He did say, however, that he had disintegrated some of the merchandise and found that the body of the goods was paper which was faced with a printed varnished paper and backed with a preparation of cork. He further stated that corkine was used as a floor covering or as a "surround" or border for rugs. Frederick Lewis Gray, manager for the manufacturers, whose deposition was taken at London, England, before the deputy consul general of the United States, declared that the corkine was made as a cheap substitute for oak flooring, or as a veneer to give a floor the appearance of oak, or as a surround for rooms. He also gave evidence showing the composition of the merchandise and the relative unit values of its constituents. According to this witness the same methods and machinery employed in the manufacture of linoleum and floorcloth are used in the manufacture of corkine, which, he said, was made up of paper valued at 15s. 6d. per hundredweight, less 5 per cent discount; ocher, at 4s. per hundredweight; chrome, at 35s. per hundredweight; whiting, at 9d. per hundredweight; Vandyke brown, at 10s. per hundredweight; linseed oil, at 35s. per hundredweight; varnish, at 90s. per hundredweight; ground cork, at 12s. per hundredweight; lampblack, at 24s. per hundredweight; litharge, at 15s. per hundredweight; rosin, at 13s. 6d. per hundredweight. The witness declined to give the quantities, relative proportions, or total values of the materials used. He said, however, that the foundation material of corkine was kraft paper, that 44 per cent of the finished product was linseed oil, and that varnish was the most costly article in the whole composition, but failed to say how much of it was used. It is clear that the value of each component as of the time that it was ready to be joined to the other components in order to form the completed article can not be computed on the data furnished by this evidence. Apparently the unit value of the various constituents stated by the witness Gray was their value in the market.

On the assumption that that value had not been increased by further processing it might be reasoned out that either linseed oil or varnish or chrome was the constituent of chief value. We can not assume, however, in this case that the market value of all the components was their value at the time they were ready to be put together in order to constitute the finished product. Kraft paper, which was both the foundation and the surfacing material, and cork, which was the backing material, might well have the market values stated, and yet as elements prepared, treated, and processed for the manufacture of corkine, either might have a greater value than linseed oil, varnish, or chrome. The value of the component materials should be determined as of the time when they have reached such a condition that nothing remains to be done upon them by the manufacturer except to put them together. *United States v. Meadows* (2 Ct. Cust. Appls., 143; T. D. 31665); *Seeberger v. Hardy* (150 U. S., 420). The importer having failed to establish the value of the materials as of the time that they were ready to be converted into corkine, his claim that the goods are manufactures in chief value of cork, paper, or wood, must lapse for lack of the definite proof which it was his duty to make.

As to whether the goods are dutiable under the provisions of section 6, we must say, as has been frequently said before by the courts, that recourse can be had to that section only in case the importation is not, in material, quality, texture, or use to which it may be applied, similar to any article enumerated in the act. *Ross v. Peaslee* (20 Fed. Cas., 1241, 1242). In this case the testimony showed that the methods and machinery employed in the manufacture of corkine are those employed by the same factory in the manufacture of linoleum and floorcloth. Admittedly linseed oil and cork are important elements in its composition. The importer and the manufacturer's managing agent agree that it is intended and designed to be used as a covering for floors, or as a veneer, or cheap substitute for oak floors. This particular importation was manufactured for the Palruba Manufacturing Co., a concern engaged in the business of importing floor coverings. The samples in evidence bear a noticeable resemblance to thin linoleum, which is a floor covering and commonly understood to be a mixture of linseed oil and cork pressed into canvas or some other equivalent material. Taking the testimony of the witnesses and the samples together, we think there was evidence tending to show that the importation was to some degree similar in material and use to linoleum, which is one of the articles enumerated in paragraph 337. The evidence to that effect was, of course, not at all conclusive nor even wholly satisfactory. Nevertheless, we think it was sufficient to exclude the goods from the operation of section 6 in the absence of anything to the contrary.

The importer having failed to establish by sufficient evidence that the goods are manufactures in chief value of cork, paper, wood pulp, or wood, as claimed by him, and there being some evidence tending to show that they are dutiable by similitude to linoleum and therefore *prima facie* not subject to the provisions of section 6, we must, even if we disagreed with the finding of the collector, sustain the board in overruling the protest.

The decision of the Board of General Appraisers is *affirmed*.

LAZARUS, ROSENFELD & LEHMANN *v.* UNITED STATES (No. 624).¹

ALABASTER PEDESTALS UNDER TARIFF ACT OF 1909.

Without determining whether the importations rise to the dignity of "sculptures" in the arts, the character of their production by wholesale would exclude them from the terms of paragraph 470, tariff act of 1909. Under that paragraph the sculptures designated must be made by hand from solid blocks of alabaster and be, too, the professional production of a sculptor only. The merchandise was dutiable under paragraph 112, tariff act of 1909, as alabaster manufactured into articles.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7174 (T. D. 31331).

[Affirmed.]

Churchill & Marlow (Wm. A. Hines of counsel) for appellants.

D. Frank Lloyd, Assistant Attorney General (Leland N. Wood on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This controversy concerns merchandise aptly described in the opinion of the Board of General Appraisers as alabaster pedestals about 3 feet high, each consisting of a base, column, and capital. Some of the pedestals are plain in their construction, some are in the form of smooth spiral columns with plain capitals and bases, and others are fluted columns more or less elaborately decorated with conventional designs, but having plain capitals and bases.

The importation of this merchandise presented for decision the question whether or not it was properly dutiable as "alabaster * * * manufactured into monuments, benches, vases, and other articles," as provided in paragraph 112 of the tariff act of 1909, at 50 per cent ad valorem, or as "sculptures," at the rate of 15 per cent ad valorem under paragraph 470 of said act.

The word "sculptures" in said paragraph 470, as a part of said paragraph, is further modified by the expression—

But the term "sculptures" as used in this act shall be understood to include only such as are cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as are the professional production of a sculptor only.

¹ Reported in T. D. 32247 (22 Treas. Dec., 227).

The intent of the Congress in these enactments may be in a measure ascertained from the comparative language of the paragraphs.

At the outset the fact that sculptures of the class provided for in paragraph 470 were accorded an exceptionally low rate of duty is significant. The provisions of the two paragraphs contrasted make it plain that as between the "manufactures of alabaster" provided for in paragraph 112 and the "sculptures" provided for in paragraph 470, the latter are deemed of a higher order of production. While the articles included in each paragraph are of precisely the same substance, the former having thereupon applied labor of either a less amount or of an inferior character, are made dutiable at a manifold higher rate than the latter. Obviously the higher order of productions was the object of this favor of Congress. Further, the language of the qualifying clause of paragraph 470, wherein it is provided that in order that the exceptionally low rate provided under that paragraph may be enjoyed, requires that the articles must be "the professional production of a sculptor *only*." This restriction of the class of articles accorded this exceptionally low rate of duty to such as have been produced by a higher order of labor, skill, and genius affords light upon the intent of the Congress. The included requirement that they must be "cut, carved, or otherwise wrought *by hand*" is another guide to the intent of the Congress, when it is noted that the character of that hand is further required by the statute to be one guided by a higher order of intelligence, skill, and art.

So, the appositive influence of the language of paragraph 470 is instructive. Paragraph 112 provides for "alabaster manufactured into monuments, benches, vases, and other articles." Obviously many of such articles would be within the term "sculptures." That term, therefore, in paragraph 470 must be so construed, if possible, as not to conflict with the terms of the former paragraph. In this the former must be held to be more or less an index of what was intended by the latter. Reading the two paragraphs together, and bearing in mind the foregoing observations as to the noted evidences of the congressional purpose, therefore, we have no difficulty in ascertaining the legislative intent as calculated upon the one hand to protect the labor and industrial arts of this country against the competition of similar and cheaper labor of foreign countries, while the other paragraph, upon the other hand, permits in the interest of art and education the introduction into this country at a low rate of duty such sculptures as are the product of a higher order of skill and artistic conception. The purpose of Congress is therefore best subserved by confining the application of the latter paragraph as thus indicated.

Paragraph 470, as hereinbefore quoted, differs only slightly from the corresponding paragraph of the tariff act of 1897. The only

change is that of the word "sculptures" in the act of 1909, being substituted for the word "statuary" in the act of 1897.

It is said by the Board of General Appraisers in its opinion that undoubtedly the word "sculptures" gives a broader significance and scope to the statute than the word "statuary," and by reason of that fact a more extended scope is to be accorded this paragraph of the act of 1909 than to the corresponding paragraph of the act of 1897. This is undoubtedly true.

The character of the merchandise, however, imported in this case, and the facts with reference to the production thereof as disclosed by this record, and the findings of the Board of General Appraisers, which seem amply supported by the facts in the record, render unnecessary, in our opinion, the consideration of the exact scope or any precise definition of the word "sculptures" as herein employed by Congress.

The line of demarcation between that which constitutes a sculpture, as recognized in the arts and history, and that which does not arise to the dignity of such, is one often difficult of determination and dependent upon narrow lines of distinction. If that were the task imposed upon this court in this instance an available aid and assistance is afforded the court by the able and exhaustive review of authorities made by the counsel for the Government and presented in this case.

We think, however, that, without determining the precise point whether or not the imported merchandise in this case does or does not arise to the dignity of, and is or is not included within the definitions of, "sculptures," as that word, unmodified by any language whatsoever, is accepted in the arts, this production is excluded from the benefits of the particular paragraph by reason of the excluding language above quoted. That language requires, as a qualification to what sculptures may be introduced into the commerce of this country under that paragraph, that such sculptures be made "by hand;" that they be made "from solid blocks of alabaster;" that they be made as "the professional production of a sculptor *only*." Conceding they are sculptures, were they such made in this manner?

The Board of General Appraisers found, as a fact in the case, that the importation was not "the professional production of a sculptor *only*." The board states:

They were made in large establishments which apparently turn out thousands of such pedestals every year, and wherein a large force of mechanics and artisans are employed.

We think this finding of the board amply sustained by the evidence. It appears that they are such articles as are ordered from catalogues,

according to a number distinctive of a particular standard design, and that while the institutions wherein they are produced are superintended by such well-recognized sculptors as Barbefiere and Solaini, the evidence falls far short of showing that there is any further consideration given their production of these pedestals than the general superintendence of their production by the labors of those not entitled to be classed as "professional sculptors." Undoubtedly the same articles produced in the manner exacted by the statute might present a record for consideration which might lead to a different conclusion.

There is, however, in this record nothing which characterizes the production of the particular articles of importation as products of the immediate design or superintendence or personal labor essential under the decisions and the language of the statute to so impress the production with any of the attributes of skill or personality or impressiveness of any character, which can properly identify the productions with any of the accomplishments, skill, labor, or designs of any particular sculptor, or even of a sculptor. They are produced by the thousands each year, generally superintended, it is true, by admittedly professional sculptors, but in no sense receiving the personal design, direction, workmanship, or other attention necessary to impress upon the article itself, or in any wise dignify or identify it as the work of a professional sculptor. The merchandise constitutes industrial products and not sculpture, as provided in the eliminating language of paragraph 470.

The workmanship and character of these articles as imported does not differ in any substantial particular from the usual order and kind of "monuments, benches, vases," as defined in paragraph 112. They may well be included within the catch-all provision of that paragraph as "other articles" as they are similar to the previously enumerated articles. All such, as a rule, have some degree of ornamentation not dissimilar to that upon the imported merchandise. It may well be concluded upon that point alone that this merchandise, not further ornamented than the usual character of articles provided for in paragraph 112, and not having in design any special attributes which impress the eye or arrest the mind with the peculiar beauty or impressiveness of its constructive qualities, is not within the category of sculpture as contemplated by Congress and afforded an exceptionally low rate of duty as a matter of art; but rather as within the category of industrial productions. Being, therefore, rather of the class of the industrial products than matters of art, we do not think they are entitled to the benefits of the low rate of duty afforded by paragraph 470.

Decision affirmed.

DRAKENFELD & Co. v. UNITED STATES (No. 685).¹

CADMIUM SULPHIDE, A PIGMENT OR COLOR.

The importation may be described as a pigment or color, or as a chemical compound or salt. Its place in science and commerce, however, has apparently been fixed by its use and by its being chiefly known as a pigment or color. This designation is the more specific and it must prevail as against one more general in kind, and without any limitation as to use or other qualification. It was dutiable as assessed under paragraph 58, tariff act of 1897.—*Fink v. United States* (170 U. S., 584).

United States Court of Customs Appeals, February 1, 1912.

TRANSFERRED from United States Circuit Court for Southern District of New York, G. A. 6659 (T. D. 28402).

[Affirmed.]

Comstock & Washburn (Albert H. Washburn of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case is "cadmium sulphide," sometimes called "cadmium yellow," and the importation was made under the tariff act of 1897.

The exhibits show the article in the form of dry powder, having in one case a clear lemon color and in another case a deep saffron. It is said that the color of the substance varies from a light-yellow to a dark red as a result of the differing conditions under which it is prepared.

The collector classified the importation as a pigment or color under paragraph 58 of the act, and assessed duty thereon at the rate of 30 per cent ad valorem in accordance therewith.

The importers protested against this classification, and contended that the importation was free as "cadmium" under paragraph 513, or was dutiable at only 25 per cent ad valorem as a "chemical compound or salt, not specially provided for," within the terms of paragraph 3 of the act. This protest was heard upon testimony by the Board of General Appraisers and was overruled. The case was thereupon appealed to the United States Circuit Court, Southern District of New York, where additional testimony was incorporated in the record. The case did not come to trial in the circuit court, but was transferred to this court under the present act.

The appellants advise the court in their brief that they do not now insist upon their claim for free entry of the importation as "cadmium," but rely wholly upon the claim that the article is a chemical compound or salt, not specially provided for, and therefore dutiable at 25 per cent ad valorem under paragraph 3.

¹ Reported in T. D. 32248 (22 *Treas. Dec.*, 231).

It seems from the testimony and authorities that the article at bar is certainly a pigment or color, and that it is also just as certainly a chemical compound or salt; and it might aptly be classified under either of the competing paragraphs in the absence of the other one.

Cadmium sulphide, CdS , is artificially produced as a precipitate resulting from the action of sulphureted hydrogen upon cadmium sulphate or upon certain other soluble cadmium salts. This statement alone seems to be sufficient authority for describing it as a chemical compound or salt.

It seems to be equally well established that the substance is a pigment or color. The following quotations show the attitude of the authorities in that behalf:

The New International Encyclopædia:

Cadmium.—Cadmium sulphide is an orange or lemon-yellow powder that is of great permanency, and is used as a pigment under the name of cadmium yellow. It is also used for coloring toilet soaps, for the production of blue flames in pyrotechny, and in calico printing.

Wagner's Chemical Technology:

Cadmium yellow (CdS).—This pigment is prepared by the action of sulphureted hydrogen upon soluble cadmium salts; a little free acid should be present. The hotter and more concentrated the solution, the more the product inclines to a red.

The Century Dictionary and Cyclopædia:

Cadmium yellow.—A pigment prepared by precipitating a solution of sulphate of cadmium with sulphureted hydrogen, forming a sulphide of cadmium. It varies in shade from a light yellow to a deep orange, and all its tones are very clear and bright. It possesses good body and is permanent in light and air.

Murray's New English Dictionary:

Cadmium yellow, an intense yellow pigment, consisting of cadmium sulphide artificially prepared.

Thorpe, Dictionary of Applied Chemistry:

Cadmium sulphide—Cadmium yellow.—This pigment may be produced by the addition of sulphureted hydrogen or an alkiline sulphide to a solution of cadmium salt. * * *

In Watt's Manual of Chemistry and also in Parry & Coste's Chemistry of Pigments cadmium sulphide is denominated a pigment.

The testimony of the witnesses contained in the record is quite consistent with these quotations. It is, however, stated by the importer that in his trade he sells such importations altogether to manufacturers of colored glass, and that the substance is used by them neither as a color nor pigment. He states that in the coloring of glass the sulphide is used in connection with selenium metal; that the two are together mixed in with molten glass, the cadmium in such case acting only as a reagent upon the selenium, so that the glass is colored directly by the selenium alone. The importer contends, therefore,

that so far as his trade is concerned the cadmium sulphide does not serve directly or at all as a pigment or color. He also maintains that this use of the article in the manufacture of glass is its chief use, even though it is also otherwise used in lesser measure as a pigment or color.

Giving this testimony due weight, it is nevertheless safe to say upon the entire testimony, that cadmium sulphide is either used directly and alone as a pigment or color, or is used in conjunction with other materials for the purpose of coloring glass or other substances, it being one of the agencies to produce that result, and that the recognized authorities have upon these premises universally defined it as a pigment or color.

As stated above, the court is therefore led to the conclusion that the importation may be aptly described on the one hand as a pigment or color and on the other hand as a chemical compound or salt. A decision, therefore, becomes necessary upon the competition which thus arises between these classifications.

As applied to the article in hand, it seems that the term pigment or color is more limited and specific than the term chemical compound or salt. The article is in substance a chemical compound or salt, and such is its generic classification; but it is a special kind of chemical compound or salt, namely, one which is used as a pigment or color. By the latter description a limitation is imposed upon the former one. By nature and composition the substance in question is essentially a chemical compound, but it belongs to a species of that general class, namely, the species of chemical compounds which is especially used as a pigment or color. A similar question arose in the case of *Fink v. United States* (170 U. S., 584). In that case the article involved was muriate of cocaine. The competing paragraphs were those severally providing for "medicinal preparations" and "chemical compounds and salts." It was held that the article (muriate of cocaine) was both a medicinal preparation and a chemical compound or salt, but that the description by use, as a medicinal preparation, was more specific than that by composition, as a chemical compound or salt, because it specified a particular and limited class or species of such substances by force of that qualification.

The opinion in that case reads in part as follows:

In reason, the result of the certified facts is simply this, that muriate of cocaine is in its narrow aspect a medicinal preparation, in its wider a chemical salt, and hence that chemical salt is a generic term designating all articles of that character, and hence embracing muriate of cocaine as the genus, must as a matter of course contain within itself the species which are embodied in it.

As above stated, it is contended by appellants that the use of cadmium sulphide as a pigment or color is a minor use, and that the major use of the substance is as a reagent only in the manufacture of glass, and that its classification should not be controlled by such lesser use, but only by the chief use to which the article is applied.

This argument would apply with greater force if both competing classifications were couched in terms of use, but in this case the description "chemical compound or salt" does not express a use of the article, but rather its material origin and composition. The description of an article as a "chemical compound or salt" does not of itself throw any light upon the use to which such article may be applied. As between two competing classifications whose several descriptions refer only to different uses to which the importation may be put, it may be said in general that the chief use should control the classification. But in this case it does not sufficiently appear by the testimony, as a matter of fact, that the use made of the substance in the manufacture of glass is the chief use, nor is it at all clear that even such use should not be denominated a use as a pigment or a color. And in any event it appears that other uses of the article as a pigment or color are so general and well recognized that they have apparently fixed the standing of the article in science and commerce, so that it is chiefly known as a pigment or color. It, therefore, appears that this designation according to a specific use should now prevail over a competing description of a general character, without special limitation as to use or other qualification.

Upon these considerations the court concludes that the decision of the board should be, and the same is, *affirmed*.

UNITED STATES *v.* WERTHEIMER BROS. *et al.* (No. 696).¹

MOUSSELINE—WOVEN FABRICS OF SILK—MANUFACTURES OF SILK.

The goods had been for many years well known as articles of commerce and their proper classification had been fixed by judicial construction. It must be presumed that this construction was adopted when the clause in question was brought forward into the new act from the old act, furnishing thus a clear expression of legislative will. The merchandise is dutiable not as woven fabrics in the piece, but as manufactures of silk, under paragraph 403, tariff act of 1909.—*Robinson v. United States* (121 Fed. Rep., 204).

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, Abstract 25928 (T. D. 31720).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Comstock & Washburn (*Albert H. Washburn* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

MARTIN, Judge, delivered the opinion of the court:

The merchandise involved in this case was imported under the tariff act of 1909. It consists of light-texture woven articles composed of silk, 4, 6, and 10 inches in width, and variously known in

¹ Reported in T. D. 32249 (22 Treas. Dec., 234).

trade as chiffon bands or ribbons, or as gauze bands or ribbons, or as mousselines. They are used as ribbons in tying floral designs and for other like decorative purposes.

The importation was classified by the collector as "woven fabrics in the piece" composed of silk, within the terms of paragraph 399 of the act, and were assessed with appropriate duties thereunder according to their weight, color, condition, and other specifications.

The importers filed their protest against this classification and assessment, contending chiefly that the goods were not "woven fabrics in the piece," but were properly "manufactures of silk" within the terms of paragraph 403, and should be assessed accordingly.

The protest was duly heard by the Board of General Appraisers and was sustained, the board holding the goods to be "manufactures of silk," as claimed by the importers. The Government now prays for a reversal of that decision.

It is clear that the goods may properly be called manufactures of silk, and they should be so classified, unless they are also woven fabrics in the piece, composed of silk. If they fall within both descriptions, the latter should prevail, because it is the more specific of the two.

In the case reported as T. D. 21115, May, 1899, such goods as these, imported under the act of 1897, became a subject of litigation. The importation was classified and assessed by the collector as "silk trimmings," within the terms of paragraph 390 of that act. The importers protested, claiming the goods to be either "woven fabrics in the piece" under paragraph 387 or "manufactures of silk" under paragraph 391. The Government contended for the classification made by the collector, and the board held with it and overruled the importers' protest. By this ruling, under the act of 1897, goods essentially similar to the present importation were held by the board, in accordance with the Government's claim, to be "trimmings," and not "woven fabrics in the piece" or "manufactures of silk," as alternatively maintained by the importers.

The following is a copy of that section of the board's syllabus which is relevant to this case:

(1) Woven goods composed of silk, some weighing over one-third of an ounce and none more than $1\frac{1}{2}$ ounces per square yard, from 4 to 6 inches wide, with selvages or borders covering a space from one-fourth of an inch to 1 inch in width, others having narrow stripes at intervals throughout, which are used directly in these widths for trimming women's hats, bonnets, and other wearing apparel, and are generally known as "chiffon," "muslin bands," or as "gauze bands," or as "gauze ribbons," are dutiable under the provision for "trimmings" in paragraph 390, act of July 24, 1897.

The following part also of the decision in question relates specially to the issue in hand:

Paragraph 387 of the act provides for "woven fabrics in the piece." The term "fabrics" has been held to be applicable particularly to wide or "piece" goods, which are generally intended for use in making wearing apparel and other articles (and have,

therefore, to be cut into various smaller forms requisite for that purpose), as contradistinguished from ribbons, bands, and narrow articles, which are put to their final uses in the widths in which they are made. Velvet and plush ribbons were held not to be pile fabrics, *Jaffray v. United States* (71 Fed. Rep., 953; 77 Fed. Rep., 888), and the Congress has recognized the distinction between these and wider goods by making special provision for them in paragraph 386 of the act. Cotton ribbons, web-bings, and similar narrow articles are likewise distinguished in paragraph 320 from cotton cloth—or piece goods or fabrics—in the same schedule. See *Arnold v. United States* (147 U. S., 494), *In re Kursheedt Mfg. Co.* (54 Fed. Rep., 159, and G. A. 4120).

The importers appealed the foregoing decision of the board to the Circuit Court, Southern District of New York, where the decision was reversed. The court by this reversal directly overruled the contention that the goods were “trimmings,” as classified by the collector and approved by the board, and also inferentially overruled the importers’ contention that the goods were “woven fabrics in the piece,” and sustained the alternative allegation of the importers that the goods properly came within paragraph 391 as “manufactures of silk.”

The following is a copy of the syllabus of the circuit court’s decision:

1. CUSTOMS DUTIES—TRIMMINGS.

Goods woven wholly from silk from 4 to 12 inches wide, and used directly in these widths for trimming women’s hats, etc., are not assessable as trimmings, under paragraph 390 of the act of July 24, 1897 (30 Stat., 187; U. S. Comp. St. 1901, p. 1670), not being trimmings until made into designs to be applied as trimmings, or into trimmings as they are applied to articles being trimmed, but are assessable as manufactures of silk, under paragraph 391.

Robinson v. United States (121 Fed. Rep., 204; Feb., 1903).

This decision continued to control the classification and assessment of such goods as the present importation, so long as the act of 1897 remained in force. According to it such goods were not “trimmings” nor “woven fabrics in the piece,” but were “manufactures of silk.” See also *Gartner v. United States* (131 Fed. Rep., 574).

As has been stated, the merchandise now before the court was imported under the act of 1909. The collector classified it as “woven fabrics in the piece,” under paragraph 399 of that act, and assessed duties appropriate to the specifications therein contained. The importers protested, claiming the goods to be “manufactures of silk,” which was the classification such goods had received by authority of the foregoing decision under the preceding act; and the board in conformity with that decision sustained the protest. The Government now appeals from the board’s decision, contending that the goods are nevertheless “woven fabrics in the piece.” The Government admits the authority of the cited decision under the act of 1897, but maintains that the present act differs materially from the former one in respect to such merchandise, and that the decisions interpreting the former act do not therefore control the present construction. Upon the merits of the question as an original proposition, the Gov-

ernment contends that the goods are in fact "woven fabrics in the piece," and should be so classified. In event this classification is overruled it is contended that the merchandise should be classified as articles made wholly or partly of chiffon and assessed under paragraph 402 of the act.

The Government undertakes in its brief to specify the changes in the terms of the present act as compared with the preceding one, which demand a revised classification of these goods, but the alterations in the relevant provisions do not seem to require or even to justify such a change of construction. The classification in the former act which was the subject of interpretation was "woven fabrics in the piece." The decisions above cited were interpretations of that description so far as the present question is concerned, and the cardinal terms of that description appear unchanged in the present act.

It is well also to recall that such goods were all the time well-known articles of commerce and that their classification had been distinctly fixed by the reported decision of the circuit court in the above-cited case. It may properly be assumed, therefore, that if Congress had designed to change that classification its purpose would hardly have been entrusted to mere remote analogies. The only additional classification contained in the act of 1909 which touches distinctly upon this subject is paragraph 401, which provides for ribbons and bandings not exceeding 12 inches in width; but that paragraph is modified by the provision that it shall contain only such ribbons and bandings as have fast edges. The articles in question do not come within that description, for, as the reported cases seem to show, they have a "cut edge" and not the fast edge covered by paragraph 401. Without this limitation that paragraph would have included these goods; it is therefore somewhat difficult to understand the omission from the act of an equally specific provision for bands of this character. However, that omission is not necessarily inconsistent with the theory that such goods were simply left to their former classification as adjudged by the courts. The subject was obviously within the legislative attention. This may be stated not only because of the preceding decisions and the references to them in Notes on Tariff Revision, but also because in framing paragraph 401 terms were used which would have included these goods except for the specific limitation thereafter added to the paragraph. In the absence of any clear provision to the contrary, this is sufficient authority for the conclusion that no change in classification for these articles was intended by Congress, and that the classification adjudged by the circuit court should continue in force. In general, it must be conceded that a settled rule of construction, according to which such well-known importations as these have been

for years classified; becomes adopted by the trade as a basis for commercial transactions, and should not be altered unless in conformity with a clear expression of the legislative will.

These conclusions apply likewise to the argument of appellant upon the general merits of the subject. The term "woven fabrics in the piece" does not seem properly to apply to strips of goods as narrow as those in question. This was held to be the rule by the decisions above cited, and this rule seems also to have survived in the act of 1909.

In answer to the question made relative to paragraph 402, providing for articles made of chiffon, the answer given by the board in its decision that these articles are chiffon and are not articles made thereof, seems to be correct.

The decision of the board is therefore *affirmed*.

STEIN & Co. *v.* UNITED STATES (No. 714).¹

GOODS COMPOSED IN PART OF LEVER OR GOTHROUGH LACES.

The merchandise is composed in chief value of one or more of the materials or goods specified in paragraph 349, tariff act of 1909, and relating to laces and handkerchiefs. By the terms of the first proviso of that paragraph, such articles are made dutiable at a rate not less than the highest imposed by the first section of the act on any of the materials entering into their composition. Conformably to this proviso, the rate of duty is determined by paragraph 350, tariff act of 1909, at 70 per cent ad valorem.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7232 (T. D. 31672).

[Affirmed.]

Walden & Webster (Henry J. Webster of counsel) for appellants.

Wm. L. Wemple, Assistant Attorney General (*Wm. K. Payne*, Deputy Assistant Attorney General, on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

An importation of merchandise was classified by the collector of customs at the port of New York as cotton handkerchiefs composed in chief value of Lever lace, and accordingly the goods were assessed for duty at 70 per cent ad valorem under paragraph 350 of the tariff act of 1909, which paragraph reads as follows:

350. Laces, embroideries, edgings, insertings, galloons, flouncings, nets, nettings, trimmings, and veils, composed of cotton, silk, artificial silk, or other material (except wool), made on the Lever or Gothrough machine, seventy per centum ad valorem: *Provided*, That no wearing apparel, handkerchiefs, or articles of any description, composed wholly or in chief value of any of the foregoing, shall pay a less rate of duty than that imposed upon the articles or the materials of which the same are composed.

¹ Reported in T. D. 32250 (22 Treas. Dec., 238).

The importers protested against the classification of the collector and the duties imposed, and among other grounds of objection thereto the claim was set up that the merchandise was dutiable at 60 per cent ad valorem under the provisions of paragraph 349, which paragraph, in so far as it is material to this case, is as follows:

349. Laces, * * * handkerchiefs, * * * and all other articles made wholly or in part of lace or laces, * * * wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy letter, initial, or monogram, or otherwise, * * * all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, * * * and not elsewhere specially provided for in this section, sixty per centum ad valorem: *Provided*, That no article composed wholly or in chief value of one or more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the highest rate imposed by this section upon any of the materials or goods of which the same is composed. * * *

The Board of General Appraisers overruled the protest and the importers appealed.

The uncontroverted evidence produced on the hearing shows that three kinds of handkerchiefs are included in the consignment. The first class comprises those in which the foundation material is a cotton embroidered linen handkerchief, to which has been added a cotton lace edging and cotton lace insertions made on the Lever or Gothrough machine. In this class the uncontradicted and unimpeached testimony of one of the importers definitely establishes that the value of the embroidered handkerchief exceeds the combined values of the lace edging and the lace insertions added thereto in order to constitute the finished article. In the second class the completed handkerchief is composed of an unembroidered linen fabric which has been amplified and ornamented by the addition thereto of a cotton lace edging made on the Lever or Gothrough machine and a cotton lace insertion made on the Gratley machine. Here the Gratley insertion is the constituent of chief value, and the value of the unembroidered linen center is admittedly less than that of either of the other components. The third class embraces goods made up of a linen fabric, not embroidered, a cotton lace edging and a cotton lace insertion made on the Lever or Gothrough machine, and a cotton lace insertion made on the Gratley machine. In this grade of handkerchief the value of the Gratley insertion is less than the combined values of the Lever lace edging and the Lever lace insertion, but is greater than the value of any other single component. No appeal was taken by the importers from the board's decision in so far as it affected merchandise of the third class, and therefore the classification of handkerchiefs of that particular type need not further engage the attention of the court.

On this state of facts the appellants take the position that the goods covered by the first two classes are not dutiable under para-

graph 350 at 70 per cent ad valorem as handkerchiefs composed in chief value of lace made on the Lever or Gothrough machine, but under paragraph 349 at 60 per cent ad valorem as linen handkerchiefs composed in part of lace.

As the handkerchiefs put in controversy by this appeal are not composed wholly or in chief value of lace made on the Lever or Gothrough machine, they do not come within the provisions of paragraph 350 and are not subject to the rate therein prescribed unless there be some other provision of law which makes that rate applicable to the importation. The question in the case is, therefore, reduced to this: Is there any statutory mandate which imposes a duty of 70 per cent ad valorem on goods composed in part, although not in chief value, of Lever or Gothrough laces? Counsel for the importers claim, in effect, that there is not, and their claim in that particular would be unanswerable if paragraph 339 of the tariff act of 1897 had been reenacted in the tariff act of 1909. Unfortunately for the importers, however, paragraph 339 was not reenacted, but was substantially amended in many particulars by paragraph 349, and especially by the incorporation of an additional proviso which we think subjects the goods under consideration to the rate of duty imposed by the collector. This proviso, with the parts of paragraph 349 made pertinent by the issue here presented, is as follows:

349. Laces, * * * handkerchiefs, * * * embroidered in any manner; * * * all of the foregoing, composed wholly or in chief value of cotton, flax, or other vegetable fiber, * * * sixty per centum ad valorem: *Provided, That no article composed wholly or in chief value of one or more of the materials or goods specified in this paragraph, shall pay a less rate of duty than the highest rate imposed by this section upon any of the materials or goods of which the same is composed.*

As already stated, the handkerchiefs are composed in chief value either of cotton embroidered linen handkerchiefs or of Gratley lace insertion. All the handkerchiefs are, therefore, articles composed in chief value of one or more of the materials or goods specified in paragraph 349, and under the express terms of the first proviso thereof such articles are required to pay a rate of duty not less than the highest rate imposed by the first section of the act on any of the materials or goods of which the merchandise is composed. Paragraph 350 of the first section of the act of 1909 imposes a duty of 70 per cent ad valorem on laces made on the Lever or Gothrough machine, which is a higher rate than that carried by cotton embroidered linen handkerchiefs or by cotton laces made on the Gratley machine, and the highest rate imposed upon any of the component materials. From all of which it follows that the goods are dutiable at 70 per cent ad valorem under and by virtue of the first proviso of paragraph 349 of the tariff act of 1909.

The decision of the Board of General Appraisers is therefore affirmed.

UNITED STATES *v.* DANKER & MARSTON (No. 731).¹

1. "CRUDE" ARTICLE.

Though an article may have been processed, if, as a matter of fact, it must be subjected to some additional process to fit it for its chief or only use, it is, so far as that use is concerned, a crude article.—*Roessler & Hasselacher Chemical Co. v. United States* (94 Fed. Rep., 822).

2. GUM TRAGASOL.

Gum tragasol is an article in a "crude" state used in dyeing; it is not a vegetable extract for dyeing, coloring, staining, or tanning. It was free of duty under paragraph 482, tariff act of 1897, and is free of duty under paragraph 499, tariff act of 1909.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, G. A. 7255 (T. D. 31798).

[Affirmed.]

Wm. L. Wemple, Assistant Attorney General (*Chas. D. Lawrence* on the brief), for the United States.

Searle & Pillsbury (*Wm. E. Waterhouse* of counsel) for appellees.

Before MONTGOMERY, SMITH, BARBER, and MARTIN, Judges.

SMITH, Judge, delivered the opinion of the court:

This appeal involves the classification of a commodity imported at Boston, Mass., and known as gum tragasol. Some of the gum was imported under the tariff act of 1897 and some of it under the tariff act of 1909. The collector of customs rated the product as a nonenumerated manufactured article and accordingly the importations were assessed for duty at 20 per cent ad valorem either under the provisions of section 6 of the act of 1897 or under the provisions of paragraph 480 of the act of 1909 as the date of importation might require. With the exception that the word "section" is substituted for the word "act" paragraph 480 is a reenactment of section 6, and the particular part of the section and paragraph pertinent to the case is as follows:

* * * There shall be levied, collected, and paid * * * on all articles manufactured, in whole or in part, not provided for, * * * a duty of twenty per centum ad valorem.

The importers protested that the merchandise was not dutiable as an unenumerated manufactured article not provided for, and, among other grounds of objection to the collector's classification, it was averred that gum tragasol was entitled to free entry whether imported under the tariff act of 1897 or under that of 1909. This claim was based on the following language of paragraph 482 of the free list of the tariff act of 1897, which was reenacted in paragraph 499 of the free list of the tariff act of 1909:

Articles in a crude state used in dyeing or tanning not specially provided for. * * *

¹ Reported in T. D. 32251 (22 Treas. Dec., 241).

The board sustained the protest on the ground that the goods were entitled to admission free of duty and the Government appealed.

Tragasol is a gum extracted by patented processes from the locust bean, sometimes known as St. John's bread. The patents are owned by the Gum Tragasol Supply Co. (Ltd.), of Hooton, England, and it seems to be conceded that the entire output of the commodity under consideration is manufactured by that concern. From the testimony in the case and the patents in evidence we gather that the locust beans are separated from the pods and then after being submitted to a boiling and soaking process are, after drying, put through decortivating machines in order to free the cotyledons from the husks and germs. The husked cotyledons are next placed in vats where, steeped in water, they are reduced to a pulp, which is slowly raised to a temperature of 180°. After cooking the pulp for two hours or more the gum therein separates itself from the vegetable substances involving it, and, with the water which violent agitation has forced it to absorb, is withdrawn and filtered into a pool, where it is treated with formalin, carbolic acid, or some other chemical for the purpose of preserving the product from deterioration. The article thus processed is known as gum tragasol and constitutes the merchandise imported. In the making of tragasol it appears that great care must be taken to thoroughly husk the beans in order that the pigment carried by the envelope inclosing the cotyledons may not discolor the gum when extracted. If the husks are not completely removed, then it seems that at some stage of the subsequent proceedings the materials must be treated with an appropriate chemical so as to render the pigment insoluble, and thus permit of the withdrawal of the gum as a colorless liquid. Gum tragasol is principally used in the dyeing of textiles, in which industry it serves the purpose of a carrying medium to convey the color into the body of the material to be dyed. Due to the fact that tragasol prepared for use in dyeing is more than 99 per cent water and contains less than 1 per cent of solid matter, colors carried by it penetrate the fabric readily and evenly and are characterized by a transparency which seems to be especially desirable in dyeing woven goods of a lustrous texture.

On this state of facts the Government asks for a reversal, first, because the importation is not an article in a crude state and therefore not dutiable as claimed by the importers; second, because it is dutiable as assessed; and, third, because the tragasol imported since August 5, 1909, if not dutiable as assessed, is dutiable as a vegetable extract used in dyeing under the provisions of paragraph 22 of the tariff act of 1909, which paragraph, in so far as it is pertinent to the issue, is as follows:

22. * * * All extracts of vegetable origin suitable for dyeing, coloring, staining or tanning, * * * and not specially provided for in this section, fifteen per centum ad valorem.

Counsel for the appellant contends that the merchandise the classification of which is in controversy is the resultant product of careful and elaborate processes of manufacture; that once evolved it is so finished and complete that it is ready for use without any refinement or alteration in its essential form and character, and that therefore it can not be considered as "crude," inasmuch as that term carries with it the idea of something in a natural or raw state—something which has not been processed or prepared—something which has not been manufactured or if manufactured not refined. The trouble with this argument is that we are not willing to subscribe to the definition of "crude," upon which it is based. For the purposes of this case it may be conceded that things which are in a natural or a raw state, which are not processed or prepared, which are not manufactured or if manufactured not refined, are in fact generally regarded as crude articles, but from that it does not follow that no article is in a crude state which has gone beyond its natural or raw state or which has been processed, prepared, or manufactured. Indeed an article may be evolved as the result of a series of processes and manufacturing operations and still continue to be an article in a crude state. *United States v. Continental Color & Chemical Co.* (2 Ct. Cust. Appls., 165; T. D. 31679); in the matter of *Leggett* (T. D. 21804). As applied to materials crudeness is a relative term, and to determine whether or not a thing is crude for industrial purposes some account must be taken of its intended use. However much a thing may be processed, if, as a matter of fact, it must go through some additional process of substantial preparation or manufacture in order to fit it for its chief or only use, it is, so far as that use is concerned, a crude article. *Roessler & Hasslacher Chemical Co. v. United States* (94 Fed. Rep., 822); *Leber & Meyer v. United States* (135 Fed. Rep., 243). That it was not the intention of Congress to put a meaning upon the term "crude" which would confine crude articles to those which were raw, unprepared, unmanufactured, or in a natural state, is evidenced by the fact that many articles clearly manufactured are enumerated as crude articles in one or both of the tariff acts here under consideration; as, for instance, aluminum, argols, camphor, glycerin, iodine, and sago. The fact therefore that gum tragacanth has been produced as the result of elaborate manufacturing processes is not of and by itself sufficient to take it out of the category of crude articles used in dyeing, and whatever may have been the systematic operations required to produce it, it must still be regarded as a crude article so far as dyeing is concerned, unless such operations have brought it to such a degree of completion that it is fit to be used for that purpose without further substantial manipulation or manufacture. As shown by the evidence, gum tragacanth comes to this country in the form first assumed by it as a distinct entity after its definite separa-

tion from the substances with which it was originally combined and just as it is turned out of the manufacturing establishment. In that form, however, it is not fit for use in dyeing and requires very substantial treatment with proper machinery before it becomes available for use as a carrier of dyes and colors. The evidence shows that the tragasol as imported must take up from five to eight times its bulk in water before it can be used for the purposes of the dyer and that to oblige this material, which is already 96 per cent water, to take up an additional quantity requires agitation in a special machine equipped with revolving beaters capable of a speed of from 80 to 100 revolutions per minute. From this it is clear that the gum tragasol here under consideration can not be applied to its chief use without being subjected to further substantial elaboration and preparation, and that therefore it is an article in a crude state within the decisions of the courts which have heretofore considered the meaning of the term "crude" as employed in tariff laws. In *United States v. Merck* (66 Fed. Rep., 251), the Circuit Court of Appeals, Shipman, Judge, had occasion to consider the nature and character of a sediment precipitated from the juice of a fruit resembling the cucumber in appearance. It appeared that this sediment or precipitate was dried and imported in the form of little cakes under the name of "elaterium." The Government claimed that elaterium was either a medicinal preparation or a drug advanced in value or condition. Inasmuch as it was shown that elaterium was not used by physicians as a medicine, but by the manufacturer as material from which a medicine was made, the court held the preparation to be a crude drug. In *Cowl v. United States* (124 Fed. Rep., 475), a substance known as "guarana" was classified by the collector as a medicinal preparation. It was claimed by the importers to be a crude drug. It appeared from the record in that case that guarana was prepared by shelling the seeds of the *Paullinia sorbilis*, moistening them in water, removing a papery film over the kernel, and pounding them in a mortar until they were reduced to a semisolid consistency. The article was then made up into the form of rolls, wrapped in leaves, and dried in the sun or by the fire. Guarana in that state was in its crudest form, and before being used as a medicine it was either reduced to a powder or from it was distilled an elixir after removing the leaves and other impurities. The board held that the importation was a medicinal preparation, and the circuit court on the authority of *United States v. Merck, supra*, sustained the contention of the importer that it was a crude drug. In *United States v. Continental Color & Chemical Co., supra*, this court considered the tariff classification of hydroxide of chrome, which is secured as a precipitate by treating with oxide of magnesium a liquid by-product resulting from the manufacture of anthraquinone. The collector assessed the importation as a chemical

compound, and the importers claimed that it was entitled to free entry as an article in a crude state used in tanning and dyeing. The court held that as the hydroxide of chrome was not in a condition fit for use in tanning or dyeing and required treatment with sulphuric acid for tanning purposes and with acetic acid for dyeing purposes it was an article in a crude state within the meaning of paragraph 482 of the tariff act of 1897 and paragraph 499 of the tariff act of 1909.

Whether the gum tragasol imported subsequent to the going into effect of the tariff act of 1909 is more specifically provided for in paragraph 22 of that act is the only question which remains to be determined, and the determination of that question depends upon the meaning which should be given to that particular part of the paragraph which makes provision for "all extracts of vegetable origin suitable for dyeing, coloring, staining, or tanning." We think this provision was not intended by Congress to cover auxiliary agents in dyeing, coloring, staining, or tanning, but only those agencies of vegetable origin which were themselves capable either of imparting color to other substances or of converting hides and skins into leather. Gum tragasol is not such an agency. It is not a dyestuff or coloring matter; neither has it any of the tannic qualities which would entitle it to be classed as a material for tanning.

From all of which we conclude that the merchandise imported is an article in a crude state used in dyeing; that it is not a vegetable extract for dyeing, coloring, staining, or tanning, and that therefore the decision of the Board of General Appraisers should be *affirmed*.

DE VRIES, Judge, did not sit in this case.

THAYER *v.* UNITED STATES (No. 735).¹

RACING SHELLS—MANUFACTURES OF WOOD.

Racing shells can not be held to be "vessels" in the sense in which that term is employed in section 3, Revised Statutes; and this is so without any attempt being made to set up a hard and fast rule as to what may or may not be deemed a "vessel" under that section. And a racing shell can be as little considered a "pleasure-boat" under paragraph 37, tariff act of 1909. The importation was dutiable as a manufacture of wood, under paragraph 215, tariff act of 1909.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26110 (T. D. 31757).

[Affirmed.]

Howard Stockton, jr. (*Fish, Richardson, Herrick & Neave* of counsel) for appellant.
Wm. L. Wemple, Assistant Attorney General (*Chas. Duane Baker* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

BARBER, Judge, delivered the opinion of the court:

In June, 1910, the appellant entered at the port of Boston two 8-oared racing shells, each about 60 feet long and from 2 to 2½ feet

¹ Reported in T. D. 32252 (22 Treas. Dec., 245).

wide, with a draft when loaded of about 1½ feet. The importer was the manager of the Harvard University crew and the shells were for its use and are owned by the Harvard Athletic Association.

The collector assessed the merchandise for duty as manufactures of wood not specially provided for under paragraph 215 of the tariff act of August 5, 1909. The importer protested against this assessment, claiming that these racing shells were pleasure-boats within the meaning of section 37 of the same act and therefore subject to the tonnage tax thereby imposed.

The relevant provisions of section 37 are as follows:

Sec. 37. There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States. * * *

The sections of Revised Statutes referred to in section 37 of the tariff act above quoted are as follows:

Sec. 4214. The Secretary of the Treasury may cause yachts used and employed exclusively as pleasure-vessels, and designed as models of naval architecture, if entitled to be enrolled as American vessels, to be licensed on terms which will authorize them to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the custom-house. Such license shall be in such form as the Secretary of the Treasury may prescribe. The owner of any such vessel, before taking out such license, shall give a bond, in such form and for such amount as the Secretary of the Treasury shall prescribe, conditioned that the vessel shall not engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects. Such vessels so enrolled and licensed shall not be allowed to transport merchandise or carry passengers for pay. Such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this title.

Sec. 4215. All such licensed yachts shall use a signal of the form, size, and colors prescribed by the Secretary of the Navy; and the owners thereof shall at all times permit the naval architects in the employ of the United States to examine and copy the models of such yachts.

Sec. 4217. For the identification of yachts and their owners, a commission to sail for pleasure in any designated yacht belonging to any regularly organized and incorporated yacht club, stating the exemptions and privileges enjoyed under it, may be issued by the Secretary of the Treasury, and shall be a token of credit to any United States official, and to the authorities of any foreign power, for privileges enjoyed under it.

SEC. 4218. Every yacht visiting a foreign country under the provisions of the four preceding sections, shall, on her return to the United States, make due entry at the custom-house of the port at which, on such return, she shall arrive.

The Board of General Appraisers on hearing the protest sustained the action of the collector, and held that—

An 8-oar racing shell is neither a yacht, pleasure-boat, or vessel within the meaning of the statute invoked.

It is not contended that paragraph 215 is inapplicable if it be held that section 37 does not apply to the merchandise in suit.

The appellant invokes section 3 of Revised Statutes for the meaning of the word "vessel," which section is as follows:

SEC. 3. The word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

These racing shells were brought to this country on board the steamship *Cambrian*, of course are foreign built, and the importer contends that they are vessels within the meaning of section 3, above quoted. If they are vessels within the meaning of said section 3, it must be conceded that they are not articles of merchandise within the meaning of the tariff act, and therefore not dutiable under paragraph 215 thereof.

In *The Conqueror* (166 U. S., 110), in discussing this question; the Supreme Court said:

But the decisive objection to the taxability of vessels as imports is found in the fact that, from the foundation of the Government, vessels have been treated as *sui generis*, and subject to an entirely different set of laws and regulations from those applied to imported articles. By the very first act passed by Congress in 1789, subsequent to an act for administering oaths to its members, a duty was laid upon "goods, wares, and merchandise" imported into the United States, in which no mention whatever is made of ships or vessels; but by the next act, entitled "An act imposing duties on tonnage," a duty was imposed "on ships or vessels entered in the United States." * * * This distinction between "goods, wares, and merchandise" and "ships or vessels" has been maintained ever since, although the amount of such duties has been repeatedly and sometimes radically changed.

The case of *The Conqueror* involved the question of whether a steam yacht of some 370 tons burden, as we understand, was a manufactured article under the tariff law of October, 1890, or was a vessel under section 3 of Revised Statutes, and as such vessel exempt from tariff duties. The Supreme Court held it was a vessel within the meaning of the section, and discussing the question said:

We do not undertake to say that the same rule applies to canoes, small boats, launches, and other undocumented vessels, which are not used, or are not capable of being used, as a means of transportation on water, as the word "vessel" is defined in Revised Statutes, section 3. While these vessels have a limited capacity for transportation, they are ordinarily used for purposes of pleasure, and are not considered of sufficient importance to require them to be entered at the customhouse or to be entitled to the special protection of the flag. They are treated like other similar vehicles used upon land, and there are reasons for saying that these boats, which do

not ordinarily come of themselves into the country, but are imported or brought upon the decks of other vessels, are mere manufactures of other "articles," and are within the description of the tariff acts.

While some of the last-quoted language was unnecessary to the decision of the issue involved and therefore strictly speaking *obiter*, it is quoted not only as indicating the views of the Supreme Court with reference to the meaning of the section, but as suggesting a very proper interpretation thereof. To give to section 3 the meaning claimed by the importer here is to say that any artificial contrivance, however small, provided it is used or is capable of being used as a means of transportation on water for however short a distance, makes it a vessel under the statutes. Were this literally so there would seem to be no escape from the conclusion that the "dugouts" or the rude rafts of primitive man, capable only of transporting little weight and for short distances in smooth water, would be vessels within the meaning of said section. But when it is considered that there are other provisions in the statute relating to the ascertainment of tonnage, the registration or enrollment, as well as licensing of vessels, we think it is obvious that Congress could not have meant by section 3 that every artificial thing that floats on water and of sufficient buoyancy to be used as a means of transporting anything, however small, is a vessel in the eyes of the law, but must have meant that to be a vessel it must be capable of some substantial use as a means of transportation on water. A temporary, fugitive, impractical, although possible, use for transportation of articles or things of trifling weight in smooth water only and for short distances we do not think could possibly answer the call of the statute.

The question naturally arises, Have these racing shells, apart from the question of their being pleasure-boats, which will later be considered, risen to the dignity of a vessel capable of being used as a means of transportation on water? Admittedly they are not designed for transportation except of the crew of eight or nine men for the purposes of racing or of practice preliminary thereto. The term "racing shell" implies that use, and their construction confirms it.

It would hardly be expected that a racing shell would commonly be used for transporting persons or property from place to place to any substantial extent or for practical purposes. They are, rather, implements of a race between contending crews in the smoother waters, and the feature of transportation thereby is purely collateral. While we do not attempt to establish any hard and fast rule as to what may or may not be deemed a vessel within the meaning of section 3, it seems to us that these racing shells clearly are not.

In *The International* (83 Fed. Rep., 840), the District Court for the Eastern District of Pennsylvania said in substance that dredges and scows were vessels; that they were generally held to be within

the jurisdiction of admiralty; that they were valueless except as water craft; that they carried cargoes and were capable of being used as a means of transportation, and referring to said section 3, the court observed that "it applies to whatever falls naturally within the scope of its terms." Its judgment was affirmed by the Circuit Court of Appeals for the Third Circuit in 89 Fed. Rep., 484.

The statute has also received consideration by the Treasury Department in T. D. 17373, where a yacht of not more than 2 tons burden which it was proposed to sail into port from a foreign port stood upon the same footing as did a larger vessel and was not "goods, wares, and merchandise" within the meaning of the tariff act. In T. D. 16667 the Department held that yachts sailing into any port of the United States from a foreign port were not dutiable under the tariff act of 1894.

The Board of General Appraisers in T. D. 30354 held that a gasoline launch 22 feet by 6 feet by 28 inches in dimensions was a vessel within the meaning of the section.

These references are made to illustrate the treatment of the question by those called upon in different capacities to interpret the meaning of the word "vessel" as used in section 3.

The importer, however, asserts that under the provisions of section 37 of the tariff act of 1909, above quoted, these racing shells are pleasure-boats and therefore entitled to the benefits and privileges therein accorded to the same. The section provides that a tonnage tax shall annually be levied and collected upon such pleasure-boats, but gives the owner thereof the option to pay in lieu of such tonnage tax a duty of 35 per cent ad valorem, and further provides that thereupon the pleasure-boat shall be entitled to all privileges and be subject to the requirements of the sections of Revised Statutes therein referred to.

These sections provide for and regulate the enrollment and licensing of yachts used as pleasure-vessels and designed as models of naval architecture if entitled to be enrolled as an American vessel. An examination of the sections discloses that it is contemplated such pleasure vessels shall be of sufficient stability and seaworthiness to enable them to proceed from port to port in this country or to foreign ports by sea.

It may not of necessity follow because Congress has extended to pleasure-boats the right to the benefits of the quoted Revised Statutes that such boats *must* be of sufficient seaworthiness and stability of construction to enable them to undertake a cruise from port to port, but it is, we think, strongly suggestive that it did not use the term as applicable to such boats as these racing shells. It is true their use in practice for races and while participating therein may give pleasure to the crew or to the spectators who may behold the practice or the

race, yet we do not think the word "pleasure" in the connection with "boat" refers to the pleasure or enjoyment of the beholder, but relates to the pleasure or enjoyment of those who occupy and use the boat itself. There is, of course, pleasure and enjoyment in the exhilaration which the vigorous physical exercise upon the practice spin gives to the boat's crew and the same may be said of the race, especially if they win, but to enjoy it they must be physically well and accustomed to the use of racing shells. The feeble, the immature, and the unskilled are precluded therefrom.

The great mass of people is from the very nature of things excluded from obtaining pleasure by the use of such boats as these racing shells. They are mainly if not wholly designed for purposes of athletic exercise and for the acquirement of skill and efficiency in the art of rowing and almost if not quite exclusively used for the purpose of boat racing as distinguished from a boat used for excursion or pleasure purposes in the ordinary acceptance of those words, and, we think, are not pleasure-boats within the meaning of the paragraph.

There is another consideration, if one be necessary, which would seem to lead to the same conclusion. The record shows that the protestant has not ascertained the tonnage of these racing shells, but it is argued that the Revised Statutes provide how this may be done. We have examined the sections to which appellant's counsel has referred and others related thereto, and the irresistible conclusion therefrom to us is that they do not contemplate the ascertainment of the tonnage of such boats as these racing shells.

These statutes provide amongst other things for the registry of vessels whose tonnage is to be ascertained and that if not exceeding 50 tons burden a bond in the sum of \$400 shall be given, one of the conditions of which shall be that in the event the vessel is by casualty or by an enemy or otherwise prevented from returning to the port to which she belongs, the certificate of registry shall, if preserved, be delivered up to the collector of the district, and further, if the vessel is sold or transferred while at sea, or at a foreign port, the certificate shall likewise be surrendered. The statutes referred to further provide that the certificate of registry must express certain particulars of measurements and provide in detail for elaborate measurements and calculations for the purpose of determining the tonnage, none of which does it seem essential to discuss here, but all of which, while it is *possible* some of them may be applicable to these racing shells, clearly indicate, we think, that Congress contemplated the tonnage provisions of the law to apply to vessels or boats of a character much more substantial, durable, and seaworthy than are obviously these racing shells. Revised Statutes, Title XLVIII, relating to registry and recording.

It follows that these boats are articles manufactured in whole or in chief value of wood and dutiable under paragraph 215.

The judgment of the Board of General Appraisers is *affirmed*.

COMEY & JOHNSON CO. v. UNITED STATES (No. 742).¹**HATTERS' PLUSH, WHEN ASSESSABLE AS SILK PLUSH.**

It is clear that paragraph 477, tariff act of 1909, must be taken to refer specifically to material used exclusively for making men's hats. The intention was to encourage the domestic production of men's hats. The proof shows the importation was made for the manufacture of millinery goods or women's hats, and that it was so used. It was not entitled to the benefit of the paragraph named, and it was properly assessed as a silk plush.

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26178 (T. D. 31774).

[Affirmed.]

A. A. Stearns for appellant.

Wm. L. Wemple, Assistant Attorney General (*Thos. J. Doherty* on the brief), for the United States.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

This controversy turns upon the construction to be given paragraph 477 of the tariff act of 1909, which is in the following language:

477. Plush, black, known commercially as hatters' plush, composed of silk, or of silk and cotton, such as is used exclusively for making men's hats, 10 per centum ad valorem.

The importation in question was assessed under the provisions of paragraph 399 of the same act at the rate of \$2.40 per pound, or about 60 per cent ad valorem, as a silk plush.

Many of the difficulties in this inquiry are overcome, and light shed thereupon, by the ascertainment of the intent of Congress in the enactment of the paragraph in question.

It is indispensable to a correct understanding of a statute to inquire first, What is the subject of it, what object is intended to be accomplished by it? *Lewis's Sutherland Statutory Construction* (vol. 2, sec. 347).

A comprehensive view of the entire act, and the comparison of this paragraph in relation to other paragraphs of the act, unmistakably disclose the intent of the Congress in the enactment of the particular paragraph. In every other provision of the act, relating to silk goods and manufactures of silk, no less a rate of duty than 35 per cent ad valorem is provided. In the particular paragraph an especially low rate of duty of 10 per cent ad valorem is provided. This rate of duty is of the lowest rates exacted upon imported merchandise, and is one customarily fixed by Congress upon very crude raw materials which are to be used in the manufacture of other wares. In any event, the comparatively low rate of duty here exacted upon a class of merchandise which otherwise is uniformly assessed at exceptionally high rates of duty indicates beyond doubt the intention

¹ Reported in T. D. 32253 (22 Treas. Dec., 251).

of Congress to foster the particular industry using such importations in its manufactures. Measured by this incontestable rule, the intent of Congress in the enactment of the particular paragraph was to favor the men's black silk hat industry in this country, and to supply it with an exceptionally cheap raw material consisting of a high grade of goods.

In that view the intent of Congress to limit the phrase "such as is used exclusively for making men's hats" to those made in this country and not abroad becomes perfectly apparent. If it were the intent of Congress in this provision to upbuild the silk-hat industry in this country any other construction of that sentence in the paragraph than one limiting its scope to this country would defeat the intent of Congress as here manifested.

We think that the limiting phrases of the paragraph, (1) "known commercially as hatters' plush," and (2) "such as is used exclusively for making men's hats," are not difficult of interpretation. They require that imported articles receiving the benefit of being assessed for duty under this provision must be known commercially as hatters' plush, which is admittedly true in this case, and must be such as in this country are exclusively used in the manufacture of men's black silk hats. The latter provision does not seem to have been satisfied by the testimony in this record. The goods were imported by a house devoted to the manufacture of millinery goods, or women's hats, and were admittedly used for that purpose. Indeed the controversy really turns upon and was directed to the point whether or not this imported merchandise could in any case be used in the manufacture of men's black silk hats in this country. Weighing this evidence carefully we would be inclined to make a finding against the importer upon that point.

While it may be true that the incidental use of a black silk plush made and adapted exclusively for use in the manufacture of men's black silk hats in this country for some other purpose would not defeat the right to the benefits of this paragraph, it nevertheless must be true that in order to come within purview thereof it should at least be necessary that it should not be made and imported for another entirely distinct use, as is disclosed by the record with reference to the particular importation.

The manifest intent of the Congress to subserve this single industry makes plain the purpose of the language employed. It is the men's black silk hat industry, and no other industry, that is to receive the benefit of this provision, and whenever it is disclosed by the record that the importation is an article used by another industry than this the case is not made which entitles the importer to the benefit of this provision of the law.

The decision of the Board of General Appraisers is *affirmed*.

CONCURRING OPINION.

BARBER, Judge, concurring:

I concur with the result reached by the court in this case. I do not, however, in all respects agree with the interpretation it places upon paragraph 477.

Assuming that a purpose of the paragraph, as stated by the court, is "to favor the men's black silk hat industry in this country and to supply it with an exceptionally cheap raw material consisting of a high grade of goods," I think that purpose is accomplished by holding that such black plush articles, composed of silk, or of silk and cotton, as are commercially known in this country as hatter's plush are entitled to the low rate of duty provided in the paragraph, if it also appears that they are of the character and standard exclusively used in the manufacture of men's hats. If, however, at the time the law was enacted, or later, it is found that such a commodity may be devoted to other purposes, it is also still entitled to the same benefit. In other words, I think the law is this: If such plush is the only kind used for making men's black silk hats in this country it may be used for other purposes and still be dutiable under paragraph 477.

The construction given the paragraph by the court would, it seems, make it necessary that the importation should be devoted to the manufacture of men's black silk hats only, which involves the further necessity of following each importation to its ultimate use in manufacture in order to correctly determine the rate of duty.

It is just as reasonable, I think, to suppose that Congress designed to protect any other industry which used this kind of plush as the silk-hat industry, and therefore that the language of the paragraph is descriptive of the plush and means plush of the kind that is used in the manufacture of men's hats to the exclusion of other similar fabrics, and I see no reason why it is to be presumed that Congress intended to give the men's hat industry a monopoly of importing the plush at the low rate of duty. Establishment of new industries might thereby be prevented, which, as I view it, is not the policy of the law or the intent of Congress in the enactment of the paragraph in question.

The history of previous legislation on this subject and its interpretation by the Board of General Appraisers seems to sustain the interpretation which I would give to the statute.

Paragraph 593 of the act of 1894 admitted to free entry—

593. Plush, black, known commercially as hatters' plush, composed of silk, or of silk and cotton, and used exclusively for making men's hats.

In T. D. 16577, the Board of General Appraisers had before it the interpretation of this paragraph. It held, and I think properly,

that thereunder exclusive use was the test, and it appearing that the merchandise there involved was not exclusively used for making men's hats, that it was not entitled to the benefit of free entry. See also T. D. 15825.

Paragraph 461 of the act of 1897 was made to read—

461. Plush, black, known commercially as hatters' plush, composed of silk, or of silk and cotton, such as is used exclusively for making men's hats, ten per centum ad valorem,

and this identical language was preserved in the paragraph now before the court.

In T. D. 25381, construing the paragraph of 1897, the Board of General Appraisers had before it goods invoiced as half silk plush. The case as reported does not show for what purpose the merchandise was imported. The board said the testimony showed that there were low grades of hatters' plush that are not used exclusively for making men's hats, but that the importations involved were such plush as is exclusively used for making men's hats and sustained the protest. In other words, without any evidence as to the purpose for which the merchandise was to be used the board held it fell within the class of that used exclusively for making men's hats.

In T. D. 30791 the board again considered this paragraph. The merchandise was a black plush, concerning which the board said:

The testimony taken at the hearing shows that it is known commercially as hatters' plush, and is such a plush as is used for making men's hats.

The evidence further showed that the merchandise was used in making women's hats in exceptional cases. In its conclusion the board used this language:

In the act of 1894, as well as in the act of 1890, Congress limited the provision to plushes known commercially as hatters' plush and used exclusively for making men's hats. We think it was the intention of Congress by thus changing the language of the paragraph to enlarge the provision so as to include within its terms such plush as is known commercially as hatters' plush, and is recognized in the trade as a standard article which is used in the manufacture of men's hats to the exclusion of other similar fabrics.

I think this indicates the true interpretation to be given to the paragraph under consideration. If Congress designed in the act of 1897 to limit the plush which was entitled to the low rate of duty to that which was to be exclusively devoted to the making of men's hats it was unnecessary to change the language of paragraph 593 of the act of 1894, except to add the duty provision. Instead of doing this it used the language "such as is used," and I think thereby, as the board said in its decision last above quoted, enlarged the provision.

The construction which this court now gives to the paragraph negatives such enlargement and construes the same as if it read,

"and exclusively used," or "if exclusively used," either of which expressions would be precise and apt language required to warrant the construction now given it, and neither of which is used.

I do not lose sight of the fact that in the decision of the board last above referred to it also said that because the plush was used on rare occasions for other purposes it was not thereby excluded from the classification given to it. But this language does not diminish the force of their reasoning as to the effect of the paragraph and was doubtless induced by the facts in that particular case.

In its decision in the case at bar the board again reiterated its former conclusion that "to bring the merchandise within the provisions of the paragraph it must be shown that the article is commercially known as hatters' plush and is recognized in the trade as a standard article which is used in the manufacture of men's hats to the exclusion of other similar fabrics." Congress will be presumed to have retained in the present act the language of the paragraph in the act of 1897 in view of the foregoing interpretation.

One of the arguments set forth in the Government's brief in this case is here quoted:

Experience has shown that it is impracticable to follow imported merchandise into consumption for the purpose of fixing the rate of duty it shall pay; that is to say, to postpone the final ascertainment of the duty until the merchandise has been consumed. Nothing was more natural than that a change in the statute should be made, which, while restricting the privilege of entry at 10 per cent to black hatters' plush used in the men's silk-hat industry, clarified the statute by ridding it of a condition that was impossible or impracticable of performance. In other words, the effect of the change was to substitute for proof that a given consignment of plush was actually used, or to be used, in the manufacture of men's hats, proof that the plush was of the same kind or quality or fitness of plush that was selected by the makers of men's hats for their purpose; or, putting it in another way, that the plush was "such as is used exclusively for making men's hats." This last quoted phrase undoubtedly fixes a standard of use by which to classify for duty black hatters' plush, and the determination of whether or not a plush is of this standard necessarily involves consideration of its character, quality, and fitness for the making of men's hats.

Men's silk hats are made only of certain grades of plush, and these grades, and the character and quality they imply, are well established and known in the trade. If, as appellant urges, paragraph 477 is satisfied if the plush be black hatters' plush, why were the legislators so particular to specify "such as is used exclusively for making men's hats?" Why should this restriction be inserted, if the intention was to include plush used for women's, misses', and children's hats as well? The statute definitely says for making men's hats, and this is a fairly clear indication of an intent to include only the plush that possesses the necessary characteristics, quality, and fitness for that purpose, and to exclude all plush which does not possess these necessary properties.

The above, as I understand, is the gist of the Government's main contention and is also in accord with the views I hold as above expressed as to the interpretation of the statute.

In its opinion I think the court goes further than the Government contends and further than the decision of the case requires. The

opinion seems to lose sight altogether of the fact that by the use of ~~the~~ words "such as" Congress designedly enlarged the paragraph which, before these words were inserted, made ultimate use the test, and which, in its quoted argument, the Government concedes was impossible or impracticable of performance. By the use of the quoted words, as the Government also contends, the statute was enlarged to include all plush which is of the standard, character, quality, and fitness for the making of men's hats. In other words, the majority opinion gives no force whatever to the words "such as," which to my mind must be given a descriptive effect and were used in the sense of *the kind* that is used, or else be held meaningless.

Therefore, while I concur, as stated, in the decision of the court for the reason that the evidence fails to establish that the merchandise ~~involved~~ is of the character that is used in the manufacture of men's hats to the exclusion of other similar fabrics, nevertheless I feel constrained to dissent in this manner from the interpretation which the court gives to the paragraph and which I think is misleading and may be embarrassing in the future.

UNITED STATES *v.* RETTIG ET AL. (No. 756).¹

PRO FORMA INVOICE FOR ENTRY PURPOSES.

The pro forma invoice for purposes of entry takes the place of the certified invoice and is a complete substitute therefor; and so, the production and filing on some day later than the date of filing the pro forma invoice of papers required by regulations to be produced and "filed with the entry," is not a compliance with articles 570 and 571, Customs Regulations of 1908.—*McBride v. United States* (1 Ct. Cust. Appls., 293; T. D. 31354); *United States v. Frank & Lambert* (2 *ibid.* —; T. D. 31973); *United States v. Bennett & Loewenthal* (2 *ibid.* —; T. D. 31975).

United States Court of Customs Appeals, February 1, 1912.

APPEAL from Board of United States General Appraisers, Abstract 26388 (T. D. 31832).

[Reversed.]

Wm. L. Wemple, Assistant Attorney General (*Chas. E. McNabb* on the brief), for the United States.

No appearance for appellees.

Before MONTGOMERY, SMITH, BARBER, DE VRIES, and MARTIN, Judges.

DE VRIES, Judge, delivered the opinion of the court:

The merchandise here imported consisted of crates containing vegetables. The contents and the containers were assessed for duty as a whole, in accordance with subsection 18 of section 28 of the tariff act of 1909, the containers or crates being treated as a part of the merchandise.

¹ Reported in T. D. 32254 (22 Treas. Dec., 256).

It is claimed by appellees that the crates are entitled to free entry as American goods returned under paragraph 500 of the said act, which reads:

500. Articles the growth, produce, or manufacture of the United States, * * * when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other containers or coverings of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; * * * but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury. * * *

In accordance with the foregoing provision of law the Treasury Department duly promulgated articles 570 and 571 of the Customs Regulations, 1908, which were subsequently duly made applicable to the tariff act of 1909. These articles are as follows:

ART. 570. *Declaration—Oath.*—There shall be filed with the entry a declaration made by the foreign exporter of the goods before the United States consul, stating that the merchandise was imported from the United States, and that it was not advanced in value or improved in condition by any process of manufacture or other means while abroad, and also an oath or declaration of the owner, importer, consignee, or agent on form catalogue No. 594.

ART. 571. *Bond for declaration.*—If it be impracticable to produce the declaration of the foreign exporter at the time of entry, a bond may be given for its production.
* * *

The merchandise was entered by pro forma invoices and bonds given for the production of duly certified invoices. At the time of such entry no claim was made that the goods were entitled to free entry, nor was any bond offered or given for the production of a declaration tending to establish American origin, as provided by said article 571 of the Customs Regulations, 1908. Moreover, the goods were not returned by the appraiser as domestic products. Subsequently and within the time provided by the bond to produce duly certified invoices the same were produced accompanied by declarations of the foreign exporters which were filed with the certified invoices. They were assessed for duty by the collector as before stated.

At the hearing before the Board of General Appraisers testimony was offered upon behalf of the importers tending to establish the character of the goods as of American manufacture or production. The Government objected to this testimony as inadmissible, in that the importers not having complied with the regulations at the time of entry as therein required this compliance could not be subsequently had by the introduction of oral or other testimony. The board reserved decision upon the ruling, and the record does not disclose that it was subsequently made. But one witness was called upon behalf of the importers, and the record discloses that his testimony does not establish anything other than appears in the entry papers,

so that, if error were had by the admission of this testimony, it was immaterial error.

The board sustained the protests upon the ground that the filing of the declaration with the certified invoices within the time specified in the bond for the production of the latter was a substantial compliance with articles 570 and 571 of the Customs Regulations of 1908. We think this was error.

Section 500 of the tariff act of 1909, under which claim is herein made, provides that containers or coverings of American manufactures returned shall be entitled to free entry, but this is expressly granted by Congress upon and subject to the condition of producing such proof of the identity of such articles as may be prescribed by general regulations promulgated by the Secretary of the Treasury. It has been so frequently held that such regulations, reasonable within themselves, which these seem to be, become conditions precedent to the right of free entry.

That proposition is so well settled as a matter of law that mere citation of the authorities should suffice. See *United States v. Dominici et al.* (78 Fed. Rep., 334), *United States v. Brewer et al.* (92 Fed. Rep., 341), *Roberts v. United States* (178 Fed. Rep., 607), *Morril v. Jones* (106 U. S., 466). The principle has been expressly affirmed by this court in the case of *Lunham v. United States* (1 Ct. Cust. Appls., 220 and 320; T. D. 31258 and T. D. 31409).

That a provision or regulation that an affidavit or other document shall be filed "with the entry," as provided in these regulations, refers to the pro forma entry, where goods are so entered, and that it is not sufficient to file the same at a later date when the consulated invoice is produced, after the previous filing of the pro forma entry, has been settled by the decisions of this court. See *McBride v. United States* (1 Ct. Cust. Appls., 293; T. D. 31354), *United States v. Frank & Lambert* (2 Ct. Cust. Appls., 239; T. D. 31973), *United States v. Bennett & Loewenthal* (2 Ct. Cust. Appls., 249; T. D. 31975).

We held in those cases that the pro forma invoice for purposes of entry takes the place of the certified invoice and is a complete substitute therefor. The production and filing thereafter of papers, required by the regulations to be produced and "filed with the entry," is not complied with by their subsequent production and filing with the duly certified invoice.

As the testimony in this case showed no other facts, save those disclosed by the entry papers themselves, its admission by the Board of General Appraisers, if error were made, as stated, was immaterial error and in no wise aided the case of the importer even if given full force and effect. Having failed to comply with the prescribed conditions precedent to the right of free entry the importer is without remedy by this record.

Reversed.

MEMORANDUM OF DECISIONS.

SUITS DISMISSED.

(Reported in T. D. 31734.)

APRIL 11, 1911.

Fruit in glucose.—Reiss & Brady v. United States (166), Jules Weber v. United States (182).

Reciprocity—Country of origin.—Acker, Merrill & Condit Co. v. United States (167).

Boiled-off silks.—G. Saito v. United States (315), Schwartz & Co. v. United States (316), Yokohama Importing Co. v. United States (317).

APRIL 15, 1911.

Coal slack.—United States v. Roberts (62).

Favored-nation clause.—Wakem v. United States (177), Olwell & Co. v. United States (178), Snow's U. S. Sample Ex. Co. v. United States (179), Knauth, Nachod & Kuhne v. United States (180), Conti v. United States (181), Botjer & Co. v. United States (275), Featherstone Co. v. United States (276), Petry Co. v. United States (277), United Wine & Trading Co. v. United States (278), Kuyper & Co. v. United States (279), McCunn & Co. v. United States (280), Downing & Co. et al. v. United States (405), Buchey & Co. et al. v. United States (414).

Whiskies, gins.—International Forwarding Co. v. United States (502), Lunham & Moore v. United States (503).

Storage charges.—Davids, Turner & Co. v. United States (639).

Silks in the gum.—Vantine & Co. v. United States (387).

APRIL 27, 1911.

Philippine cigars.—United States v. Lee Toma (283).

Whiskies, gins.—Peebles Sons v. United States (570).

APRIL 29, 1911.

Lead and zinc ores.—Empire Zinc Co. v. United States (515).

Olive oil in cans.—United States v. Eastern Drug Co. (629).

MAY 8, 1911.

Wreaths in part of metal.—United States v. Robinson Straus & Co. (176), United States v. International Forwarding Co (225).

MAY 11, 1911.

Olive oil in cans.—United States v. Roberts & Co. (628).

MAY 12, 1911.

Cotton cords.—Crompton & Knowles Loom Works v. United States (600).

MAY 16, 1911.

Kipperd herring.—United States v. Bailey & Co. (395).

MAY 17, 1911.

Corundum.—F. W. Myers & Co. v. United States (44).

Granite monuments.—New York Granite Co. v. United States (243), F. B. Vandegrift & Co. v. United States (244), New York Granite Co. v. United States (320), New York Granite Co. v. United States (331), New York Granite Co. v. United States (340), F. B. Vandegrift & Co. v. United States (341), New York Granite Co. v. United States (372), Kraemer & Foster v. United States (373), F. B. Vandegrift & Co. v. United States (374), F. B. Vandegrift & Co. v. United States (386), Jones Bros. Co. et al. v. United States (432), J. F. Townsend et al. v. United States (433), Baldwin Granite Co. v. United States (435), H. & A. Allen v. United States (436), J. F. Townsend et al. v. United States (437), J. F. Townsend et al. v. United States (438), H. & A. Allen v. United States (440), H. & A. Allen v. United States (442), W. C. Townsend & Co. et al. v. United States (443), Jose Parker & Co. v. United States (444), Burton Preston v. United States (445), H. & A. Allen v. United States (446), Jones Bros. Co. v. United States (447), Jones Bros. Co. v. United States (469), Jones Bros. Co. et al. v. United States (648), H. & A. Allen v. United States (649), L. M. Elwell et al. v. United States (650), F. B. Vandegrift & Co. v. United States (653), New York Granite Co. v. United States (654), F. B. Vandegrift & Co. v. United States (655), F. B. Vandegrift & Co. v. United States (656), New York Granite Co. v. United States (657), Austin Baldwin & Co. v. United States (658).

MAY 19, 1911.

Bulbs.—Leonard Seed Co. v. United States (506). Per stipulation ordered that the decision of the Board of United States General Appraisers be reversed and that the merchandise be assessed at 50 cents per thousand bulbs under paragraph 263, tariff act of 1909.

Same order in 507 and 508, Vaughn Seed Store, and in 509, G. W. Sheldon & Co.

Wreaths in part metal.—United States v. Spingarn Brothers (251).

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China vases.—Bowling Green Storage Co. v. United States (783).

JANUARY 9, 1912.

Countervailing duty.—United States v. American Sugar Refining Co. (798).

JANUARY 18, 1912.

Chassis of American manufacture.—Tilles v. United States (611.)

Ordered, That the decision of the Board of United States General Appraisers be, and the same is hereby, reversed, and that the claim of the appellant, that the chassis of the automobile involved in this proceeding is entitled to free entry as American goods returned, be, and the same is hereby, sustained. It is further

Ordered, That the body of said automobile was properly dutiable as assessed under paragraph 141, tariff act of 1909; and said cause is remanded to the Board of United States General Appraisers for proper action in the premises.

FEBRUARY 2, 1912.

Needlecases with needles.—Dieckerhoff v. United States (604). Reversed as to part and appeal dismissed as to remainder.

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E. J. J.

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